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The American State Series

THE AMERICAN EXECUTIVE AND EXECUTIVE METHODS

BY

JOHN H. FINLEY

PRESIDENT OF THE COLLEGE OF THE CITY OF NEW YORK
FORMERLY PROFESSOR OF POLITICS PRINCETON UNIVERSITY

AND

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MEMBER OF THE PENNSYLVANIA BAR

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PREFATORY NOTE

This note is but to state that the publication of this book, long delayed because of unanticipated and imperative duties under which I have been placed, is made possible even now only by the able co-operation of John F. Sanderson, Esq., whom I have associated with me in this labor in order to complete the series.

J. H. F.

New York City,
Oct. 31, 1908.

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THE AMERICAN EXECUTIVE
AND
EXECUTIVE METHODS

THE AMERICAN EXECUTIVE AND EXECUTIVE METHODS

CHAPTER I

COLONIAL GOVERNORS

The American Executive is an institution of native origin. The American executive power has been always a constitutional, in the sense of a written, power. It has been always conferred and limited, specified, and occasionally defined, either by royal charter, commission and instructions, by corporate by-laws, by proprietary frame of government, or by written constitution. The American Executive is not the successor of the British king. The Declaration of Independence when proclaimed found colonial governments organized, with legislative, executive and judicial powers long in use, and with a settled form of administration based upon the common law of England modified as suited to their condition, the English statutes applicable, and their own statute laws and local usages. Connecticut and Rhode Island, having elective executives, continued under their royal charters, Connecticut until 1818, Rhode Island until 1842. As the executives of the other colonies were constituted by royal or proprietary au-

thority, these formed new constitutions in which the executive power was composed of familiar elements. The state executive was modeled upon and took the place of the provincial governor. We will look, therefore, for a moment, at the prototype of the office that has become in one of its variations the first in power and dignity in the world.

The office and function of provincial governor developed during a period of change in English constitutional history. The first permanent colonial settlements were made under the Stuart kings, and continued during the war of king and Parliament, the parliamentary and military despotism of Cromwell, the Stuart reaction and the changes wrought by the Revolution of 1688—through the period during which the principles of ministerial responsibility, cabinet administration and party rule were becoming established. George III. had himself instituted and was engaged in a constitutional reaction at the time the colonies revolted. He sought to rule as well as to reign but was compelled to yield. *Habeas corpus,* resistance to law by proclamation, the right of the people to vote their own money for supply, and other principles of the petition of right and declaration of right, contended for during this period in England, became the established rights of Englishmen, and as such were appropriated to themselves by the colonists. The Declaration of Independence was framed in protest against executive abuses and usurpations, but it was in reality an expression in permanent form of resistance to the asserted authority of Parliament.[1]

[1] The Declaratory Act of 1766 asserted that the king's maj-

As a large portion of the local authority of the colonial governors was interpreted by the principles of royal prerogative, a preliminary statement of this prerogative may be made, although no complete description of prerogative powers was ever practicable. "The Crown writers considered it not necessary to maintain that all the royal prerogatives exercisable in England, were of course exercisable in the colonies, but only such fundamental rights and principles as constituted the basis of the throne and its authority, without which the king would cease to be sovereign in his own dominions. Hence the attributes of sovereignty, perfection, perpetuity and irresponsibility,

esty, with the advice of Parliament had, and of right ought to have, full power to make laws of sufficient validity to bind colonies in all cases whatever. Pitt asserted the legislative power of Parliament but said: "Taxation is no part of the governing or legislative power. Taxes are a voluntary gift of the Commons alone." Lord Camden maintained the distinction and Lord Mansfield ridiculed it. Royal governors supported their demands with arrogant claims of royal prerogative and set up their instructions against the express provisions of royal charters and colonial laws. Royal ministers asserted that the king's instructions were the laws of the land "for the king is legislator of the colonies." In 1774 Lord Mansfield decided that the king in council might lawfully impose a duty upon exports from a newly ceded territory, conquered from France (the Island of Grenada) unless precluded by some prior act, but that in the particular case the Order in Council in question (1764) imposing the duty was invalid because the king in his proclamation of 1763 had precluded himself from exercising a legislative authority over the island in consequence of his grant of legislative powers to its governor, council and assembly, Campbell *v.* Hall, Cowper, 204.

which were inherent in the political capacity of the king, belonged to him in all the territories subject to the Crown, whatever was the nature of their government and laws in other respects. Everywhere he was the head of the Church and the fountain of justice, everywhere he was entitled to a share in the legislation (except where he had expressly renounced it), everywhere he was generalissimo of all forces and entitled to make peace or war. But minor prerogatives might be yielded where they were inconsistent with the laws or usages of the place, or were inapplicable to the condition of the people.

"In every question that respected the royal prerogatives in the colonies where they were not strictly fundamental in their nature, the first thing to be considered was whether the charter of the particular colony contained any express provision on the subject. If it did, that was the guide. If it was silent, then the royal prerogatives in the colony were precisely the same as in the parent country; for in such cases the common law of England was the common law of the colonies for such purposes. Hence, if the Colonial Charter contained no peculiar grant to the contrary, the king might erect courts of justice and exchequer therein; and the colonial judicatories, in point of law, were deemed to emanate from the Crown and under modifications made by the colonial assemblies under their charter. The king also might extend the privilege of sending representatives, to new towns, in the colonial assemblies. He might control and enter a *nolle prosequi* in criminal prosecutions, pardon crimes and release forfeitures. He might

present to vacant benefices and he was entitled to royal moneys, treasure trove, escheats and forfeitures. No colonial assemblies had a right to enact laws without the assent of the Crown either by charter or commission or otherwise, and if they exceeded the authority prescribed by the Crown, their acts were void. The king might alter the constitution and form of government of the colony where there was no charter or other confirmatory act by the colonial assembly with the assent of the Crown, and it rested merely on the instructions and commissions given from time to time by the Crown to the governors. The king had the power to vest in the royal governors in the colonies from time to time such of his prerogatives as he should please: such as power to prorogue, adjourn and dissolve the assemblies; to confirm acts and laws; to pardon offences; to act as captain-general of the public forces; to appoint public officers; to act as chancellor or supreme ordinary; to sit in the highest court of appeals and errors; to exercise the duties of vice-admiral; and to commission privateers. These last, and some other prerogatives of the king, were commonly exercised by the royal governors without objection." [1]

The king in council assumed, about 1680, an appellate jurisdiction, which was disputed by some of the colonies, but was in full and undisturbed exercise throughout the colonies at the time of the Revolution.[2] In Maryland, Connecticut and Rhode Island, the laws were not required to be sent to the

[1] 1 Story, Constitution, sec. 184.
[2] *Ibid.*, sec. 176.

king for his approval. In Connecticut and Rhode Island the governor had no negative upon the laws; in Pennsylvania the council had no negative but was merely advisory to the governor; in Massachusetts the council was chosen by the legislature and not by the Crown, but the governor had a negative on the choice.[1] In all the colonies local representative bodies were established, and the local legislatures were asserted to possess full local legislative power independently of Parliament. For a long period prior to the Revolution the provinces of New Hampshire, New York, New Jersey, Virginia, the Carolinas and Georgia, were under provincial or royal government. Proprietary governments existed in Maryland, Pennsylvania and Delaware; charter governments in Massachusetts, Rhode Island and Connecticut. Delaware had a separate assembly, but was under the executive authority of Pennsylvania. The proprietary governor was the agent of a private person or group of persons; the royal governor received his power from the Crown. The extent of the powers of these did not greatly vary, and they had as a rule beside their special and internal responsibilities certain functions pertaining to the general administration of the royal government, such as those relating to Indian affairs and trade regulations under the navigation laws.

With local variations, the general constitution of executive government in the colonies, was a single head, appointed by the Crown or proprietary, except

[1] 1 Story, Constitution, sec. 176.

in Connecticut and Rhode Island, with a council, in the appointment of which the governor had more or less influence. The early governor was not the executive of a settled political community. Political functions were joined to commercial. Turbulence and an exposed frontier developed a military element. The powers conferred were expressed at first in very general terms, although, as time passed, the commissions and instructions increased in length and particularity. Lord Delaware, in 1610, was commissioned governor and captain-general with power to enforce martial law "and upon all other cases as well capital as criminal and upon all other accidents and occasions there happening, to rule, punish, pardon and govern according to his discretion or instructions, or by laws enacted by him, or with the advice of his council." Governor Nicholl's commission was similar. The modern separation of powers was not thought of, and the governors exercised a more or less limited faculty of legislation by ordinance or regulation. In the earliest periods the governor was sometimes a member of the Assembly; sometimes governor and council and Assembly sat together, the governor exercising the right both of vote and of veto. In Maryland he used proxies and summoned additional members of Assembly by special writ. Separation of the Assembly, the representatives of the people constituting the lower house, commenced in 1666, in Virginia, and prevailed in all the Colonies except Pennsylvania. The governor's right to sit in the upper house was advised against by the Crown officers in 1725, but a controversy on the subject continued.

The governor succeeded in retaining his veto and a general control of councilors through his influence in their appointment. In most colonies the council was the highest court of appeal.

The governor's appointment took the form of an order of the king in council on the nomination of the Board of Trade or the proprietaries. The commission was usually at the king's pleasure. It was terminated by the king's death, until by 7 and 8 William III. and 1 Anne it was provided that the commission should continue for six months after the demise of the Crown. The governor was expected to reside within the colony, and it became usual to insert in his commission or instructions a clause forbidding him to come to Europe without special permission from the Crown. Disability was provided for by succession of a lieutenant-governor, senior councilor, or appointee of council. His emoluments were salary, fees and shares of fines and forfeitures. He recommended to the Assembly legislation desired by the Crown, and was expected to report fully to the home government the condition, wants, commerce, military resources, revenue and administrative and legislative proceedings of his colony. The Board of Trade, originating in 1696 in a Crown commission, became the home organ for conducting colonial affairs, and the governor's correspondence was with the Board and one of the principal secretaries of state. Except in Massachusetts and Pennsylvania councilors were appointed by the Crown. Twelve was the usual number. The practice came to be to appoint one out of three proposed by the gov-

ernor. He made provisional appointments. Local representation was an element in choice of councilors. They were removed by the Crown and were subject to suspension by the governor. Sometimes certain officers were *ex officio* councilors. Meetings of the council were called by the governor, though they were sometimes stated. The functions of the councils were judicial and advisory, and legislative when sitting as an upper house of Assembly.

The general principle pervading the provincial executive authority was that of agency for the Crown, interpreted by the traditions of the royal prerogative. Power of appointment; chief command; calling and dissolving assembly; co-ordinate power in legislation; the right to grant charters to cities and towns, to establish ports, markets and fairs, to pardon except for treason or felony;—these were principal powers of the governor. His power was based on his commission and on his instructions. "The commission contained the grant of power, while the instructions told how that power was to be used and frequently limited its scope. For example, the commission empowered the governor to act with a quorum of three councilors, the instructions required a council of five except in emergencies; the commission authorized him to appoint judicial officers, the instructions made necessary the advice and consent of the council for the making of such appointments; the commission authorized him to erect courts, the instructions forbade the erection of courts without special warrant from the Crown; finally, the commission empowered him to make laws in conjunction with the council

and Assembly, the instructions forbade him to assent to certain classes of laws,"[1]

The executive was further limited to govern "according to such reasonable laws and statutes" as might be enacted by the provincial legislatures and by local usages of various sorts based upon precedent.

His commission authorized him to arm, muster and command all persons residing within his province, to transport them from place to place, to resist all enemies, pirates or rebels, if necessary to transport troops to other provinces to defend such places against invasion, to pursue enemies out of the province, to do independently these and other things properly belonging to the office of commander-in-chief. By advice of his council he might establish fortifications and execute martial law. His vice-admiral's commission conferred extensive powers. He conducted affairs with other colonies and with the Indian tribes and, with the advice and consent of his council, concluded treaties. Indian wars and boundaries were fruitful subjects of discussion. The governor's power of military appointment was independent; of civil appointment limited. He kept the public seal, made grants of lands and of charters of incorporation. When his instructions were silent he was authorized, with the advice and consent of council, to take provisional action, giving immediate notice to the home government. His pardoning power was limited; he

[1] The Provincial Governor, E. B. Greene, p. 94.

controlled prosecutions. The important judicial function of the governor and council was the hearing of appeals under various limitations of amount involved. As keeper of the seal he had a theoretical equity jurisdiction which was not favorably regarded. "As a part of the ecclesiastical jurisdiction he had the probate of wills and the issue of marriage licenses; either alone or with the council he usually acted as a court of probate; in Massachusetts and New Hampshire at least, the governor and council constituted a court for the decision of questions of marriage and divorce."[1] Beyond his absolute veto, his influence in legislation was more political than legal. His appointment of sheriffs had its influence upon the elections. Salaries, the voting of supplies, and the control of appropriations by his warrant, were subjects of interminable controversy in the assemblies. "'Every proprietary governor,' it was said, 'has two masters; the one who gives him his commission and the one who gives him his pay,' adding, 'the subject's money is never so well disposed of as in the maintenance of order and tranquillity and the purchase of good laws.'"[2] He was subject to removal by the home government, acted under the sanction of an oath and was subject to penal provisions. In 1700 the jurisdiction of the King's Bench over him in criminal matters was defined by Parliament. In 1770 his civil liability was decided by Lord Mansfield—"He must be accountable in the Court of

[1] The Provincial Governor, E. B. Greene, p. 142.
[2] *Ibid.*, p. 175.

King's Bench, for otherwise he could be held to account nowhere."[1] Legal action was rare. The resort to Westminster Hall for remedy was almost impracticable.

[1] Fabrigas *v.* Mostyn, 20 How. St. Tr., 231.

CHAPTER II

THE AMERICAN STATE EXECUTIVE UNDER THE CONFEDERATION

The Declaration of Independence marked an era in constitutional history. In 1776 and soon after, the colonies, excepting Connecticut and Rhode Island, framed new constitutions, embodying the new principle, now widely adopted as the fundamental principle of a frame of government, namely, the separation, so far as practicable, of the legislative, executive and judicial powers, including the determination of the functions to be exclusively vested, or shared, or checked.[1] Those functions which were selected, enumerated and vested in the executive were accounted to be properly executive in their nature, and were derived chiefly if not wholly from those formerly exercised by the provincial governors. These selected functions, continuing under new limitations, were interpreted by the common law—the common law of the colonies, with its retrospective view. No novelties were introduced; the ordinary

[1] Virginia, 1776: The legislative, executive and judiciary departments shall be separate and distinct so that neither exercise the powers properly belonging to the other, nor shall any person exercise the power of more than one of them at the same time, except that the justices of the county courts shall be eligible to either house of assembly.

practical administration continued as before, substantially modified only by the new definitions and by its independence of the Crown. Practical experience and an observation from afar of the course of events in England, had enabled the colonists to undertake the new definitions of power with clear views. The royal attributes of sovereignty, perfection, perpetuity and irresponsibility, ascribed to the king, were seen to be inherent in the people. The American executive was not a sovereign, but an agency. He was a mortal man. His imperfection and mortality were recognized. Provision was made for his impeachment and punishment, and for a temporary succession in case of his disability.

The legislative powers under American state constitutions are general. Like the parliamentary power, they have a legal omnipotence, subject only to the limitations and exceptions defined by the Constitution of the state and of the United States. But the executive and judicial powers are granted and enumerated. They are not general in the sense in which the legislative powers are general. Having been granted and enumerated they are both interpreted by the common law. The constitution of Virginia of 1776 declared that the governor should not "exercise any power or prerogative by virtue of any law, statute or custom of England" and gave emphasis to the declaration by providing that he should not "prorogue or adjourn the Assembly, nor dissolve them at any time." The South Carolina constitution of 1776 vested the executive power in the "president and commander-in-chief limited and restrained as

aforesaid." North Carolina and Delaware made similar provision. The Maryland constitution of 1776 provided that the governor should not "under any pretense exercise any power or prerogative by virtue of any law, statute or custom of England or Great Britain."

In 1776,[1] Connecticut enacted the continuance of the charter of 1663 as the supreme law of the State "under the sole authority of the people thereof, independent of any king or prince whatever." Rhode Island after enacting a change of allegiance seems to have proceeded silently under her old charter. The other states, not having elective executives, formed new constitutions. The preamble of the New Hampshire constitution recites: "The sudden and abrupt departure of His Excellency John Wentworth Esq. our late governor, and several of his council, leaving us destitute of legislation and no executive courts being open" we are therefore "reduced to the necessity of establishing a form of government." And the preamble of the constitution of New York, reciting the exclusion of the colony from the protection of the king of Great Britain expressed the inconvenience of the existing government by a congress (of the state), and by committees, in which, as of necessity, many

[1] The constitutions of this period are: South Carolina, 1776, 1778, 1790; New Hampshire, 1776, 1784, 1792; New Jersey, 1776; Maryland, 1776; Virginia, 1776; North Carolina, 1776; Pennsylvania, 1776, 1790; Delaware, 1776, 1792; Georgia, 1777, 1789; New York, 1777; Vermont, 1777, 1786, 1793; Massachusetts, 1780. Some intermediate constitutions are not referred to. Vermont is included though not fully recognized until 1791.

legislative, judicial and executive powers had been vested.[1]

The settled form of constitutional organization came to be: a governor, exercising a sole authority checked in part by the advice and consent of a Senate or upper house; and two houses exercising legislative powers subject to the executive's suspensive veto. Under the Confederation the constitutions adopted show the transition from the provincial to the modern form of organization. In Pennsylvania, until 1790, the executive power was vested in a governor and council, the legislative in a House of Representatives. In New Hampshire, Vermont, New Jersey and Georgia, the council constituted a Senate or upper house of Assembly. The Senate of Vermont

[1] General Gage, the last royal governor of Massachusetts, was besieged in Boston. Eden of Maryland, Dunmore of Virginia and Campbell of North Carolina, found refuge on British ships of war. Governor Franklin of New Jersey was sent under arrest to Connecticut. Governor John Penn, of Pennsylvania, was imprisoned in 1777, refusing to sign a parole.

Governor Gage arrived from England, May 17, 1774, to succeed Governor Hutchinson. He was received with every mark of respect by the civil authorities, the military and a vast concourse of the inhabitants. When his commission was read in the council chamber salutes were fired and the people cheered. A few days after he was escorted to Salem and was there received by a procession. The Assembly met May 25, in Boston. It elected twenty-eight councilors, of which Governor Gage negatived thirteen. He gave notice of the king's command for holding the General Court at Salem and adjourned the court to meet there. "Hence the assembly was in session on the seventeenth day of June in the old and quiet town of Salem. It contained members who voted for the resolve of 1764, inviting all the assemblies to concert of

was constituted in 1836. In New Hampshire from 1790 and in the original constitutions of South Carolina, Virginia, Maryland, North Carolina, Delaware, New York and Massachusetts, a council to the governor, as a body separate from the upper house, was constituted. It was variously styled "council of state," "privy council," or simply, "the council." In New York it took the form of a council of appointment. The Maine constitution of 1820 adopted the council as it existed in Massachusetts, and it became a permanent institution in these two states and in New Hampshire. In Maryland it continued until 1851; in Virginia, the number being reduced to three in 1830, it continued until the Civil War; in New York, the council of appointment continued until 1821;

action; for the call of the Congress of 1765; for the circular letter of 1768,— and who were of the 'glorious ninety-two' who refused to obey the king's order to rescind the letter. The doors of the chamber in which they met were locked as was usual when important business was to be transacted. Samuel Adams submitted resolves designating the first day of September as the time, and Philadelphia as the place for holding the Congress, providing for the appointment of five delegates, and for a tax on the towns of five hundred pounds to defray the expenses. Thomas Flucker, bearing a message from the governor, applied for admission. On being denied, he stood on the stairway leading to the hall, and read to the crowd a proclamation dissolving the assembly [a power not granted the governor who was in time to take the place of the royal governor]. The House, however, went on with its business. The resolves were adopted and the speaker was ordered to transmit them to the speakers of the assemblies of the continent." Frothingham's Rise of the Republic, 331. This will suffice to indicate how the royal executive authority came to an end in the colonies.

South Carolina and Delaware abandoned the council in 1790. In Pennsylvania the council was elected from districts under a system of rotation. In New Hampshire and Vermont it was elected; in New Jersey one member of council was elected from each county and seven members were a quorum to advise the governor. In South Carolina three were chosen by the Assembly and three by the legislative council; in Delaware two each by such bodies; in New York the council of appointment was chosen by the assembly from the senate; in Massachusetts, North Carolina, Virginia and Maryland, the council was chosen on joint ballot of the two houses of the legislature. It became elective in Massachusetts in 1855.

The provision was general that the acts and proceedings of the council should be recorded and signed by those consenting; that any member might cause his protest against any action, and his reasons for it, to be recorded; and that the proceedings of the council should be subject to the call of either house of the legislature.

The powers of the council were variously specified. The Virginia constitution of 1776 provided that the governor should, with the advice of the council of state, exercise the executive powers of government according to the laws of the commonwealth; the constitution of South Carolina provided that he should not be obliged to consult the council except as therein provided. Appointments, embodiment of the militia, pardons, embargoes, call of extraordinary sessions of the legislature, its adjournment in case of disagreement between the two houses,

were subjects commonly assigned to the action and advice of the council.

The principle of the separation of the powers of government in its practical interpretation by the framers of the first American constitutions was applied to the official persons in whom the powers were vested and by whom they were to be exercised, so that, as stated above, those officers entrusted with powers under either branch of the government should not exercise those pertaining to another branch; but as to the mode of choice of the persons by whom executive and judicial functions might be exercised, a different principle prevailed. Chief executive officers were chosen by the legislature, and the high judicial officers were appointed by the executive, subject to the constitutional check. The modern tendency is to a further separation, so that the chief and principal officers of each of these two branches shall be chosen by the direct action of the people.

Under the first constitutions of New Jersey, Maryland, Virginia, North Carolina, South Carolina, Pennsylvania and Delaware the chief executive magistrate, styled "governor" or "president" was elected on joint ballot of the two houses of the legislature. In New York, Vermont and Massachusetts he was elected by the freemen. In Pennsylvania he became elective in 1790. In New Hampshire he was at first chosen by the council, but the constitution of 1792 provided for his election by the people and he was required to be an inhabitant of the state, of £500 freehold, and of the Protestant religion. The freehold

qualification was dispensed with in 1852 and the provision as to religion was stricken out in 1877. In Massachusetts there was a freehold qualification of £1000; and the governor was required to declare himself of the Christian religion. In Delaware he was ineligible after three years; in New York he was required to be a wise and discreet freeholder; in North Carolina he was eligible three years out of six and must have a freehold of £1000; in Virginia he was eligible no longer than three years and was then not again eligible until the lapse of four. There was a freehold qualification for governor in Maryland and he was not to continue more than three years and then not again until after five. South Carolina fixed the governor's salary but at first any mention of salary in the state constitutions was rare. Provision for the succession of a lieutenant-governor, or vice-president, or president of Senate, or speaker of Assembly, was made; sometimes the emergency was absence from the chair, generally disability, frequently absence from the state as well. Liability to impeachment was assumed. In Delaware the president—that is, governor—was impeachable when he was "out of office and within eighteen months thereafter." Vermont, until 1850, when the function was transferred to the House of Representatives, had a council of censors who impeached. In New York, the court of impeachment was the president of the Senate, the senators, the chancellor and the judges of the Supreme Court or a majority of them, sitting for that purpose. The governor of Georgia was required to reside where the Assembly might appoint. South

Carolina in 1790 provided that he should reside at the seat of government when the legislature was in session; at other times where in his discretion the public good might require.

Some exceptional powers were at first conferred. The constitutions of Pennsylvania, Vermont, North Carolina and Delaware gave the executive authority to lay embargoes for a period not exceeding thirty days in recess of the assembly. In South Carolina the vice-president and council had chancery powers. In New Jersey the governor was chancellor, ordinary and surrogate-general, and, with council (seven being a quorum), a court of appeals of last resort, in all cases of law, "as heretofore."

But the new and characteristic function of the American executive is the suspensive veto. The original English theory was that the sovereign made the laws by the advice of his great council. The original form of a bill was that of a petition from the Lords and Commons for the enactment of certain measures therein set forth. Granting the petition, the king, by his judges, reduced the enactment to the form of a statute. Bills in the form of statutes were introduced because the king in the preparation of the statute had frequently departed from the terms of the petition. With variations the form of the enacting clause remained: "Be it enacted by our sovereign Lord the King with the assent of the Lords spiritual and temporal and the commons in this present Parliament assembled and by authority of the same." The royal assent was declared *"le roy le veut,"* the king wills it so to be. The refusal was

in the terms "*le roy s'avisera,*" the king will advise upon it. Under party rule, and the necessity for the ascendency of the cabinet party in Parliament, the royal assent following the advice of the cabinet as of course, the royal veto lost its place and the royal dissent had not been signified in England within about three-quarters of a century before the American Revolution. But the provincial governor's veto was then an active function and was absolute. Some of the first constitutions did not provide for a veto; in some the necessity for the assent of governor and council seemed to continue. In South Carolina a rejected bill after an adjournment of three days might be brought up again. In Maryland it was provided that every bill passed by the Assembly, when engrossed, should be presented by the speaker of the House of Delegates, in the Senate, to the governor, who should sign the same and affix the great seal of the state in the presence of both houses. In Georgia it was provided that all laws and ordinances should be sent to the council (upper house) for its perusal and advice. The governor might preside in the council, except when it was taking into consideration and passing laws and ordinances offered to it by the Assembly. In 1776 the Pennsylvania provision was: "To the end that laws, before they are enacted, may be more maturely considered, and the inconvenience of hasty determinations as much as possible prevented, all bills of a public nature shall be printed for the consideration of the people before they are read in the General Assembly the last time for debate and amendment, and except on occasions of sudden ne-

cessity shall not be passed into laws until the next session of the Assembly, and for the more perfect satisfaction of the public the reasons and motives for making such laws shall be clearly expressed in the preambles." Vermont made a similar provision in 1786. In 1793 it was there provided that bills were to be laid before the governor and council for revision or concurrence, and proposal of amendment, and if, on return with proposals, they were not agreed to by the Assembly, it should be in the power of the governor and council to suspend the passing of such bills until the next session of the legislature.

The third article of the constitution of New York of 1777 was as follows: "And whereas laws inconsistent with the spirit of the constitution, or with the public good may be hastily and unadvisedly passed: Be it ordained, that the governor for the time being, the chancellor, and the judges of the Supreme Court, or any two of them, together with the governor, shall be and are hereby constituted a council to revise all bills about to be passed into laws by the legislature; and for that purpose shall assemble themselves from time to time when the legislature shall be convened, for which, nevertheless, they shall not receive any salary or consideration under any pretense whatsoever. And that all bills which have passed the Senate and Assembly, shall, before they become laws, be presented to the said council for their revisal and consideration; and if upon such revision and consideration it should appear improper to the said council, or a majority of them, that the said bill should become a law of this state, they shall return

the same, together with their objections thereto in writing, to the Senate or House of Assembly (in whichsoever the same shall have originated), who shall enter the objections sent down by the council at large in their minutes, and proceed to reconsider the said bill. But if after such reconsideration two-thirds of said Senate or House of Assembly, shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be considered, and if approved by two-thirds of the members present, shall be a law. And in order to prevent any unnecessary delays be it further ordained, that if any bill shall not be returned by the council within ten days after it shall have been presented, the same shall be a law, unless the legislature shall by their adjournment, render a return of said bill within ten days impracticable, in which case the bill shall be returned on the first day of the meeting of the legislature after the expiration of the said ten days." The constitution of Massachusetts of 1780 in more brief phrase provided for the presentation of bills and resolves to the governor, making regulations of subsequent action after the New York plan, adding the requirement of a vote by yeas and nays; "and the names of the persons voting for or against the said bill or resolve shall be entered upon the public records of the commonwealth." The federal constitutional Convention of 1787, combining the plan of New York and Massachusetts and closely following the language of these constitutions, provided for the veto by the President. Pennsylvania

in 1790 adopted the provision of the federal constitution as the rule of action by the governor and legislature, adding "unless sent back within three days after their next meeting."

The period from a time shortly before the Declaration of Independence until shortly after the federal constitution was in effect, was one of constitution-making in the colonies and states. At the close of this period the principal and general elements of the executive power of the chief magistrate of the American state had been formulated. As found in two or more or all of the state constitutions they were: the suspensive veto, the power to call extraordinary sessions of the legislature, to adjourn the legislature in case of disagreement as to adjournment between the two houses, to convene the legislature at a safe place in case of danger at the seat of government, and the duty "to take care that the laws be faithfully executed." (This last phrase was first used in the Pennsylvania constitution of 1776; it was copied in some of the other state constitutions, adopted in the federal constitution, and is now generally used.)[1] Furthermore the governor was commander-in-chief; he might embody the militia; he had the power of pardon and a power of appointment; he might require information from executive officers and communicate information and make recommendations to the legislature; he filled casual vacancies and signed commis-

[1] In Mississippi, 1868, and Arkansas, 1874, the phrase is "He shall see that the laws are faithfully executed." In Texas, 1876, "He shall cause the laws to be faithfully executed."

sions and grants attested by the great seal of the state; he was frequently the keeper of the seal; he was to transact all executive business with the officers of the state, civil and military; and he was to expedite measures agreed on by the legislature. In most of the states, as is now the general rule, he was incapable of holding any other office while acting as governor.

The executive authority as constituted in the colonies was reproduced and remained the regular form of the organization of the territorial executive power in the continental divisions of the United States.[1]

[1] See W. F. Willoughby, Territories and Dependencies of the United States (American State Series).

CHAPTER III

THE EXECUTIVE POWER: ITS UNITY OR DIVISION

To complete the sketch of the organization and mode of constituting the American state executive power, an account of the method of choice of the chief executive officers, and, incidentally, of the judges, will be given. The title of this chapter is intended to intimate the contrast between the federal type and the state form of organization. The former is the unified type, and the latter the distributed type. The unity and strength of the executive power depend upon the control of subordinates by a single head, and the practically efficient principle of this control lies in the power of appointment and removal.

In its nature the power of appointment and removal is executive; so Mr. Madison argued when the question was presented as to whether the advice and consent of the Senate, which was the constitutional condition annexed to the power of the President in the appointment of the higher officers, was also a condition, by implication, of the power of removal. The power to remove was not expressly conferred, but was admitted to be an incident of the power to appoint. Mr. Madison held that when the constitution expressed the single condition of advice and

consent to the original appointment it intended to exclude every other condition. The participation of the Senate in the executive power was exceptional and was not to be extended by inference, and hence the power of removal belonged to the President alone, without the participation of the Senate. This became eventually the settled construction of the constitution and from this power, so confirmed, "has been evolved the President's power of direction and supervision over the entire national administration."[1]

Legislative appointment may naturally include the choice of the officers, executive and ministerial, of the respective houses. The judges may properly appoint the clerks of courts and reporters of decisions. But the appointment of officers charged with the execution of the laws belongs in the nature of things to the executive authority. So the framers of the constitution planned—providing as they did—that the President should nominate, and, by and with the advice and consent of the Senate, should appoint ambassadors and other public ministers and consuls, judges of the Supreme Court and all other officers of the United States whose appointments were not therein otherwise provided for, and which might be established by law; but that Congress might vest the appointment of such inferior officers as they should think proper, in the President alone, in the courts of law, or in the heads of departments. The heads of departments and the principal executive officers, including the marshals and the district attorneys, and

[1] Comparative Administrative Law, F. J. Goodnow, p. 66.

the judges, are appointed by the President, by and with the advice and consent of the Senate.

So far as executive officers may be charged, in the exercise of a legal discretion, with the direction of executive policies, they are assumed to hold opinions in harmony with the principles of the political party which prevailed in the election of the President. The heads of departments are, as a rule,[1] chosen anew by each incoming administration. In the federal service the problem has been to remove the minor positions from the influences of party rule, so as to promote efficiency of service and to secure a reasonable certainty of tenure.

The organization of the executive power by the states has, however, followed in general a different method, and that power has undergone variations accordingly. There have been three methods employed in the constitution of the executive departments: 1), selection and nomination by the chief executive; 2), legislative choice upon joint ballot; 3), popular election. The prevailing method is now the choice of the heads of departments, or principal executive officers, as well as of the chief magistrate, by popular vote, with the result that the executive power of the state is divided.

The commissions of the colonial governors gave authority to appoint judges, justices of the peace, sheriffs, and other necessary officers for the adminis-

[1] Van Buren kept all the members of Jackson's cabinet; Tyler began his administration retaining all of President Harrison's heads of departments, and Roosevelt with McKinley's.

tration of justice and the execution of the laws. The power of removal was usually for cause, to be reported to the home government. It became the rule, not always observed, to require judicial appointments to be made by advice and consent of council. The Massachusetts charter of 1691 required the consent of the council to all civil appointments made by the governor. The dispute there was as to who should nominate. Some of the governors were inclined to construe advice and consent to mean mere advice, which might be followed or not, but the tendency was to limit the sole authority of the governor. There were charges that the power of patronage was corruptly used, and the assemblies enacted laws to restrain the appointing power of the governor by the imposition of qualifications for appointment and limitations of tenure, either in time, or eligibility to successive appointments. In Virginia and Pennsylvania, for example, the governor was obliged to select the sheriffs from names submitted to him as required by law. The assemblies also undertook to control patronage through their appropriations, granting specified salaries to officers by name; and they attempted other encroachments in various ways.[1]

In forming the early state constitutions the appointing power became of necessity an important subject for regulation. The New Hampshire constitution of 1776 provided that all civil officers for the colony and for each county should be appointed, and the time of their continuance determined, by the two

[1] The Provincial Governor, Greene 111, et seq.

houses; except clerks of courts and county treasurers and recorders of deeds. The treasurers and recorders were to be elected. The constitution of 1792 provided that all judicial officers, the attorney general, solicitors, all sheriffs, coroners, registers of probate, officers of the navy and officers of militia should be appointed by a majority of the council, and that the governor and council should have a negative upon each other in nominations and appointments. The secretary, treasurer, and commissary-general were elected on joint ballot. The South Carolina constitution of 1776 provided that justices of the peace should be nominated by the General Assembly and commissioned by the president (governor) during pleasure; that all other judicial officers, sheriffs, the commissioners of the treasury, the secretary of the colony, register of mesne conveyances, attorney-general and powder receiver, should be chosen by joint ballot of the General Assembly and legislative council. The constitution of New Jersey of 1776 provided for the election on joint ballot of the judges of the Supreme Court and Common Pleas, justices of the peace, clerks of courts, the attorney-general, provincial secretary and provincial treasurer. Sheriffs were elected by the freemen. By the Maryland constitution of 1776 the chancellor, all judges, the attorney-general, clerks of general court and of county courts, register of land office, and register of wills were to hold during good behavior and to be removed only for misbehavior on conviction in a court of law. The governor by and with the advice and consent of council appointed the chancellor, all judges and justices, the attorney-general

and all civil officers of government; assessors, constables and overseers of roads excepted. Two sheriffs were elected in each county, one of whom was commissioned by the governor. He had, moreover, power to suspend or remove any who had not "commissions during good behavior." Two treasurers were chosen by the house of delegates at pleasure, one from the eastern and one from the western shore. In Virginia and North Carolina, 1776, the principal state officers were chosen on joint ballot. In Delaware, 1776, the sheriffs and coroners were elected "as heretofore," that is, two were returned as elected and the president and privy council chose one. Justices of the peace were nominated by the House of Assembly, twenty-four from each county, of whom the president (governor), with the approbation of the privy council, commissioned twelve. The judges were chosen by joint ballot of the president and General Assembly, and in case of division on the ballot the president had an additional casting vote. The president and privy council appointed the secretary, attorney-general, registers of wills, registers in chancery, and clerks of courts. The clerks of the Supreme Court were appointed by the chief justice, and recorders of deeds by the justices of the courts of common pleas. General and field officers and all other officers of the army and navy of the state were appointed by the General Assembly on joint ballot, and the president had power to appoint all other necessary civil officers not provided for by law. By the constitution of 1792 the governor was given general and sole power of appointment of all officers whose appointment was

not provided for by the constitution. This included all the chief officers of state except the treasurer, who was elected on joint ballot. Sheriffs and coroners were chosen as before. By the Pennsylvania constitution of 1776 the president, and in his absence, the vice-president, with the council, five of whom were a quorum, had power to appoint and commission judges, naval officers, judge of the admiralty, attorney-general and all other officers, civil and military, except such as were chosen by the General Assembly or the people, agreeable to the existing frame of government and the laws that might be made thereafter, and to supply every vacancy in any office occasioned by death, resignation, removal or disqualification, until the office could be filled in the time and manner directed by law or the constitution. Sheriffs and coroners of the peace were elected, two names of sheriffs being submitted for the selection of one for commission by the president and council. Registers of wills and recorders of deeds were chosen by the General Assembly. By the constitution of 1790 the governor was given a general and sole power of appointment of all officers whose offices were established by the constitution or which might be established by law, and whose appointment was not therein otherwise provided for. This included the chief officers of state, the judges and justices of the peace. Sheriffs were chosen as before. The state treasurer was chosen on joint ballot. By the New York constitution of 1777 the state treasurer was appointed by act of the legislature, the bill of appointment to originate with the General Assembly. Other officers, except where the

constitution otherwise provided, were to be appointed by a council of appointment which was chosen annually by the Assembly, from the senators, one from each of the four great districts. The governor presided in the council and had a casting vote, but no other. Sheriffs and coroners were appointed annually. By the Massachusetts constitution of 1780 the secretary, treasurer, receiver-general, commissary-general, and naval officers were chosen on joint ballot. The governor appointed by and with the advice and consent of council all judicial officers, the attorney-general, sheriffs, coroners and registers of probate. By amendment of 1855 the secretary, treasurer, receiver-general and attorney-general were to be elected. By the South Carolina constitution of 1790 the judges of the superior courts and principal state officers were chosen by joint ballot. Sheriffs were elected and from this period the general rule was that sheriffs were elected. By the Kentucky constitution of 1792, the governor, by and with the advice and consent of the Senate, had a general power of appointment, including the judges and principal officers of state. By the Ohio constitution of 1802 all the principal officers of state, including the judges, were chosen on joint ballot. In Louisiana, 1812, the secretary of state, judges and prosecuting attorneys were appointed by the governor, by and with the advice and consent of the Senate. The state treasurer and state printer were chosen on joint ballot. In Indiana, 1816, the secretary of state, treasurer and auditor and circuit judges were chosen on joint ballot; the judges of the Supreme Court were ap-

pointed by and with the advice and consent of the Senate. The associate (circuit) judges were elected. In Mississippi, 1817, the secretary of state, attorney-general, district attorneys and judges were appointed by the governor with the consent of the Senate; the state treasurer and auditor on joint ballot. In Illinois, 1818, the secretary of state was appointed; the state treasurer and printer and the judges were chosen on joint ballot. In Connecticut, 1818, the treasurer and secretary were chosen by the electors; the comptroller, judges, justices of the peace and sheriffs by the Assembly. By amendments the comptroller was made elective in 1836, the sheriffs were made so in 1845, and the justices of the peace in 1850. By the Missouri constitution of 1820 the principal officers and judges were appointed by and with the advice and consent of the Senate; by amendments of 1850–1851 all were made elective. In Maine, 1820, the secretary of state and state treasurer were chosen on joint ballot; the other principal officers and the judges were appointed by the governor and council. In Michigan, 1835, the treasurer was chosen on joint ballot; the other principal officers were appointed. In Arkansas and Florida, 1836, all the principal officers were chosen on joint ballot. Rhode Island, 1842, elected the principal state officers and chose the judges on joint ballot. California, 1849, elected the judges and chose the principal officers by joint ballot, except the secretary of state, who was appointed.

New York, in 1846, introduced the general rule of the election by the people of the judges and principal

officers of state; Iowa followed in 1846. By amendment in Pennsylvania, in 1850, judges were made elective. Kentucky, 1850, provided for the election of judges and principal officers except secretary of state. The constitutions of Indiana and Ohio, 1851, provided for the election of all. So in Minnesota and Oregon, 1857; Kansas, 1859; Nevada, 1864; Nebraska, 1866–7. Louisiana, 1868, adhered to the old rule of appointment only as to the judges of the Supreme Court. South Carolina, 1868, chose judges of the Supreme Court and circuit judges on joint ballot and elected the principal officers of state. Georgia, 1868, chose the principal officers on joint ballot and appointed the judicial officers and attorney-general. Mississippi, 1868, and Illinois and Virginia, 1870, elected all the principal officers. Tennessee, 1870, elected the state treasurer and comptrolier on joint ballot. West Virginia made the rule of election general in 1872, Pennsylvania in 1873, except the secretary of the commonwealth, attorney-general and superintendent of public instruction, who were to be appointed. In all the later constitutions the rule of election of judges and of all the principal officers of state has been general.

The North Carolina constitution of 1876 made the judges and principal officers elective and provided that the secretary of state, auditor, treasurer, and superintendent of public instruction should constitute *ex officio* the council of state, who should advise the governor in the execution of his office; three of them should constitute a quorum; their advice and proceed-

ings in this capacity were to be entered in a journal, kept for this purpose exclusively, and signed by the members present, from any part of which any member might enter his dissent, such journal to be placed before the Assembly when called for by either house. The attorney-general was constituted the *ex officio* adviser of the executive department.

The constitution of Florida of 1868 is unique in that it provides that the governor shall be assisted by a cabinet of administrative officers, consisting of a secretary of state, attorney-general, comptroller, treasurer, surveyor-general, superintendent of public instruction, adjutant-general and commissioner of emigration, such officers to be appointed by the governor and confirmed by the Senate, and to hold their offices for the same time as the governor, or until their successors shall be qualified. The governor and cabinet are to constitute a board of commissioners of state institutions, which board shall have supervision of all matters connected therewith in such manner as shall be prescribed by law. Each officer of the cabinet is required to make a full report of his official acts, of the receipts and expenditures of his office, and of the requirements of the same to the governor at the beginning of each regular session of the legislature or whenever the governor shall require it. Either house of the legislature may at any time call upon any cabinet officer for information required by it. By amendment of 1870 the cabinet officers were made elective by the people, and the offices of surveyor-general and commissioner of emigration were

consolidated; but by the constitution of 1881, the governor's appointive powers were again enlarged to include almost all the state offices.

There is here suggested in constitutional provisions the development of the appointing power of the commonwealth executive; but as many of the appointments are under statutory authorization, the power may be decreased at any time by the legislature that grants it.

The original constitutions, in the executive article, generally commenced with the formula: "The executive power shall be vested in a chief magistrate who shall be styled the governor of the state of ———." Some added, "and shall have the title of His Excellency." When the principal officers generally became elective the first section of the executive article was frequently "The executive department of this state shall consist of a governor, lieutenant-governor, secretary of state," and other principal officers named. This is usually followed by the declaration that the supreme executive power shall be vested in the governor. The superintendent of public instruction has been frequently added to the list of constitutional officers of the executive department; sometimes the adjutant-general. The extended activities of the modern state have added by statutory provision many chief officers,[1] such as insurance commissioner, commissioner of banking, secretary of agriculture, commissioner of forestry, factory inspector; departments or boards having the care or supervision of mines, health,

[1] These will be treated in a separate chapter, *infra*, pp. 173, *et seq.*, Chapter XIII. Boards and Commissions.

highways, prisons, charities, fisheries, water supply, railroads, sinking fund, revenue, medical examiners; and other commissions. These are generally independent of the departments in charge of the constitutional officers, and herein the state type departs markedly from the federal model, for while the Federal Constitution contemplated the creation of departments, though it names none of them, leaving their creation and constitution to legislative provision, yet all the minor activities of the Federal Government, excepting those of a few commissions, are grouped under one or another of the great departments whose head is a cabinet officer, subject to appointment and removal by the President.

The state executive has always retained an extensive power of appointment, and has an increasing patronage through the creation of statutory offices, filled by and with the advice and consent of the Senate or independently, and, of necessity, a power of considerable importance in making temporary appointments to fill up vacancies happening in elective offices or, during the recess of the Senate, in offices regularly filled by its advice and consent. The Federal Constitution provides that "the president shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session." And the provision of many state constitutions is similar.

The executive power of supervision within the states is generally expressed in the provision that the governor may require information from executive

officers. Sometimes it is required to be given under oath and the penalties for perjury are prescribed. Managers of state institutions are frequently expressly included within this provision. Sometimes periodical reports are required to be made to the governor. In Massachusetts, in 1780, it was provided that public boards and officers of public magazines should report in detail to the governor when required, and every three months, without requisition. The Louisiana constitution of 1812 required the governor to visit the different counties at least every two years, to inform himself of the state of the militia and the general condition of the country. The Maryland constitution of 1867 required him to examine semi-annually the treasurer and comptroller under oath, and to inspect and review their books. By an amendment to the constitution of Michigan, in 1862, it was provided that the governor should have power, and that it should be his duty except at such times as the legislature might be in session, to examine into the administration and condition of any public office and the acts of any public officer elected or appointed, to remove from office for gross negligence, corruption or misfeasance, either the attorney-general, state treasurer, commissioner of the land office, secretary of state, auditor-general, superintendent of public instruction, member of state board of education or any other except judicial or legislative officers, and to appoint a successor for the unexpired term, reporting the causes of removal to the legislature at their next session. The Texas constitution of 1876, in addition to the usual power to require information, directs the leg-

islature to pass efficient laws facilitating the investigation of breaches of trust of all custodians of public funds, providing for their suspension and removal from office on reasonable cause shown, and for the appointment of temporary incumbents during such suspension.

The incomplete sketch, given in this and the two preceding chapters, of the history of the constitution and organization of the executive power is sufficient to sustain and illustrate the following general conclusions:

In the colonies the Lower House of Assembly was in every sense the popular body. The colonists had generally no voice in the choice of their governors, and their influence upon the executive government was principally such as might result from the adverse and sometimes hostile attitude of their chosen representatives. The executive authority was not generally in any sense a popular authority, but proceeded from and represented the authority of the Crown, and was charged in part with the execution of restrictive laws enacted by and in the interest of the mother country. It interposed an effective veto against the measures of the popular branch of the Assembly. Hence the jealousy of executive power shown in the early constitutions and the general grant of a controlling power to the General Assembly in the choice and direction of the executive authority. It appears, as already set forth in some detail, that in the large number of the early constitutions, provision was made for the choosing of the governor by the legislature.

In all of them his authority was more or less completely shared with a council or Upper House having almost an equivalent influence. In a majority of the early constitutions the council was chosen by the legislative branch, and, similarly, all of the chief executive officers were chosen by the legislature.

The Federal Constitution set the example of a strong and simple organization of the executive power. The President was made elective, upon a unique plan; he was subjected to no general advisory control; treaties and the chief appointments depended upon the concurrence of the Senate, but otherwise the executive power, within the sphere of the constitution, was single and complete.

The influence of the federal example was immediate. The executive council, except in a few states, was soon abandoned, and the choice of the governor was transferred from the legislature to the people. Those early constitutions in which this popular elective principle was strongest, had the longest life. Existent at the date of independence, it preserved the charters of Connecticut and Rhode Island as constitutions; it was originally adopted in New York and Massachusetts; and almost immediately in Vermont, New Hampshire and Pennsylvania.

But the legislative influence continued longest in the choice of the chief executive officers other than the governor. The first concessions were in the direction of granting a larger share of the power of appointment to the governor, with the concurrence of the Senate, according to the federal model.

A new and comprehensive tendency, however, soon became manifest, the influence of which has gradually

increased, an influence which has had its source in a popular distrust of the legislative power. The legislative representatives of the people have ceased to be regarded, as in colonial times, the trusted champions of the people. One of the consequences is that they have been gradually deprived of all power of selection in the constitution of the executive authority, through the transferring to the people, by election, of the choice of all or most of the chief executive officers, and by the assigning of the appointment of the others to the governor with the concurrence of the Senate. Minor local executive officers, such as sheriffs and prosecuting attorneys, are elective, and the former, as we have seen, were generally so from an early period.

Meantime the distrust of the legislative power has been shown in other ways. Constitutional provisions have prescribed an exact procedure in the passage of bills, have required that all bills except general appropriation bills shall have but a single subject which shall be clearly expressed in the title; that laws shall not be amended nor their provisions extended or conferred by reference merely, but that such changes shall be effected by re-enactment at length; many provisions of a merely legislative nature have been withdrawn from legislative modification or control, by their incorporation in the Constitution; and finally all legislative power is denied for a long and increasing list of subjects usually local or special in their nature.[1] The result of this has been to increase what has

[1] See Reinsch American Legislatures, American State Series, chapter IV.

been termed the political as distinguished from the administrative power of the governor. Charged by his official oath to support the Constitution he finds an increasing necessity for the use of the veto power in the effort to enforce upon the legislature the observance of those new limitations of legislative forms and power which the Constitution has imposed.

For reasons peculiar to itself the Federal Constitution, in the organization of the executive and legislative powers, has remained unchanged. An increase of the power of the Senate, by the requirement of its concurrence in removal as well as in appointment, was made in the Tenure of Office Act, under President Johnson's administration; it was soon modified under President Grant, with popular approval, and was finally repealed under President Cleveland. There has been no demand for the extension of the elective principle in the choice of federal executive officers. The practical application of it would be difficult. Its application to state executive officers has resulted in a divided and irresponsible authority. "Originally occupying about the same relative position (as the President) the governor has been stripped of his administrative power, and confined to the exercise of political powers, while the President has been gaining more and more administrative power until at the present time he makes or unmakes the administration of the United States. It has become impossible for the governor to become the head of the commonwealth administration because the people have decided that he shall be in the main a political officer. They have lessened his power of appointment. They have almost destroyed his power of removal. He has

been unable to develop any power of direction. The governor's office has been deprived of all means of administrative development."[1] The principal executive officers, from the accidents of elections and sometimes from their different terms of office, are not necessarily in political harmony with the governor. Each head of a department has a right to conduct its affairs independently of the governor's direction and according to his own discretion under the law. "American administrative law has added to the famous trinity of Montesquieu a fourth department, viz: the administrative department, which is almost entirely independent of the chief executive, and which, so far as the central administration is concerned, is assigned to a number of officers not only independent of the governor but independent of each other."[2] They usually appoint their own subordinates.

But there has also been a manifest tendency to increase the dignity and authority of the governor. The early and jealous restrictions upon re-eligibility, and the prescribed qualifications, except as to age and citizenship, have been generally removed. From an annual choice by the legislature a change has been made to a general tenure of three or four years. The Florida experiment of imitation of the federal model, made in 1868, lasted but two years, and the settled form of state constitution of the executive seems to be that now prevailing, with a tendency to add to the governor's powers of supervision and to confer a more extensive power of removal of officers for cause.

[1] Goodnow, Comparative Administrative Law, 81.

[2] *Ibid.*, 137. And see Bryce's American Commonwealth, 476.

CHAPTER IV

THE EXECUTIVE AND THE JUDICIARY

All the officers of the government except the President of the United States and the executives of the states, are liable to have their acts examined in a court of justice. The President and state executives, by the theory and practice of our peculiar systems of government, are exempted upon grounds of political necessity and public policy. In the exercise of their legal or constitutional discretion they are alone accountable to their country, in their political character, and to their own consciences, according to the modes and manner of their respective constitutions. Whenever the head or officers of a department are the political or confidential agents of the Executive, appointed merely to execute his will, it is clear that in such cases their acts are his acts, and whatever opinion may be entertained of the manner in which their discretion may be used, still there is no power in the courts to control that discretion, for if there were, then would the Executive will be put under the control and government of the judicial department, which is forbidden by the Constitution.

The American constitutions have made the legislative, executive and judicial departments as independent and as separate from each other as the nature

of the case will admit of, or as their necessary connection or bond of union will allow. Each department is made sovereign and supreme within its own sphere and is left in the full and free exercise of all the powers and rights respectively belonging to it. Each is a co-ordinate and equal branch of the government and they all represent the sovereign will of the people as embodied in the Constitution. The Constitution makes and ordains them all and appoints each department to guard the sacred and invaluable rights established by that instrument. The Constitution is, then, above all the departments of the government, for it creates and preserves them. The will of the people must be greater than that of their agents, or there can be no constitutional liberty or independence.

All of the departments of the government unquestionably have the right of judging of the Constitution and interpreting it for themselves. But they judge under the responsibilities imposed in that instrument and are answerable in the manner pointed out by it. The duties of each department are such as belong peculiarly to it and the boundaries between their respective powers or jurisdictions are explicitly marked out and defined. For any one department to assume powers or exercise a jurisdiction properly belonging to any other department is a gross and palpable violation of its own constitutional duty. The duty of the legislature is to prescribe the rule of action for the state, that of the judiciary to interpret that rule or to expound that law, and that of the Executive to see that the law is faithfully executed.

It is the peculiar province and duty of the courts to interpret and decide upon the laws and constitution in the last resort. If two laws are opposed to each other the Court must determine which shall govern; so, also, if the Constitution and a statute stand in irreconcilable variance. The Constitution regards the judiciary in many instances, as the final arbiter and interpreter of its will. It would be wholly impossible, without the agency and action of the courts, to preserve inviolate the rights of personal liberty and of private property, equality of taxation, the freedom of the press, liberty of conscience, the right of trial by jury, the writ of *habeas corpus*, the inviolability of contracts, when assailed by legislative or executive encroachments. And the citizens in times of commotion look to the judicial tribunals for safety and protection.

It is no answer to the argument as to the independence of the Executive to say that he may exercise his legal and constitutional duties in such a manner that individual injustice may be done without remedy or redress. So may the other departments. The Convention in forming and organizing the government did not think it necessary to place additional security around individual rights. It proceeded upon the principle that all the departments would do their duty. If in this it should be mistaken it has provided efficient remedy for every abuse of a political nature and that remedy is in the hands of the people.

The governor is required, among his principal constitutional duties, to issue writs of election to fill all

vacancies that occur in either house of the General Assembly; he is commander-in-chief of the army and militia of the state, except when they are called into the service of the United States; he may by proclamation, on extraordinary occasions, convene the General Assembly, and in case of disagreement between the two houses he may adjourn them as the Constitution provides; he is required to keep the seal of the state, to use it officially, to sign all commissions, to give to the General Assembly information of the state of public affairs, and recommend to their consideration such measures as he deems expedient, and see that the laws are faithfully executed. It is possible that individual injustice may be and generally is produced by the non-performance of any one or all of these duties. It certainly cannot be presumed that the judiciary can compel him to assume command of the army or militia when they are called into the service of the state, or that it can command him to give information to the General Assembly, or to see that the laws are faithfully executed. And his duty is as clearly political in the case of commissions as in any of the other enumerations, for among other things, he must judge of the eligibility of the person who claims to be entitled to it. In such case the exercise of his discretion must be admitted or you make him not the guardian but the violator of the Constitution.[1]

And such is the judicial doctrine uniformly de-

[1] The foregoing reasoning will be found in Marbury *v.* Madison, 1 Cranch, 137, 1803; Dodge *v.* Woolsey, 18 How., 331; Hawkins *v.* Governor, 1 Ark., 590; 33 Am. Dec., 346, 1839. The language is in part adapted from the latter case.

clared in all instances in which the governor has a discretion. There is a conflict of authority as to whether a *mandamus* or other compulsory or prohibitory judicial process will issue to the governor to control him in the performance of a duty in its nature purely ministerial. Such process has been used in Alabama, California, Montana, Ohio and Minnesota. In Arkansas, Georgia, Florida, Illinois, Louisiana, Maine, Michigan, Mississippi, Missouri, New Jersey, Rhode Island, Tennessee and Texas it is held that a *mandamus* cannot be issued against the governor in any case. The reasoning of Judge Cooley in a Michigan case was that as there was no clear line of distinction between those duties of the governor which are political and those which are ministerial, to undertake to draw one would be to open the door to an endless train of litigation to the disturbance of harmony between the executive and judicial departments. And as it was not customary to confer upon the governor duties merely ministerial, in the performance of which he is left no discretion, the presumption in all cases must be, where a duty is devolved upon the chief executive of a state rather than upon an inferior officer, that it is so because his superior discretion, judgment and sense of duty were confided in, and that it would be presumptuous for the courts to declare that a particular duty assigned to the governor is not essentially executive. But eminent judicial authority and text writers hold the rule to be safe and wise, and reasonable, which makes the governor amenable to the law for the performance of ministerial acts. Subordinate executive officers in the

exercise of a legal discretion are likewise free from judicial compulsion, but the authority to compel the performance of merely ministerial duties by such is unquestioned. The controversy in such cases is as to the nature of the duty and the right of the party.

The railroad riots of 1877 were inaugurated in Pennsylvania by a strike of the train hands of the Pennsylvania Railroad Company, who stopped traffic over the road. Portions of the National Guard of the state were sent to Pittsburgh, and a collision took place in which a number of soldiers and civilians were killed and wounded. A great riot with destruction of property ensued. The county criminal court referred the subject of the riot to the grand jury for investigation, and for that purpose a subpœna was awarded, and on non-compliance with it, an attachment against the governor, secretary of the commonwealth, adjutant-general and military officers of the Guard, who appealed from the order granting the attachment to the Supreme Court of the state. The attorney-general had filed an answer to the petition for the attachment, setting forth that the matters within the knowledge of the officers were official, that an examination of them would be detrimental to the public interests, that their attendance during the continuing riotous conditions in the state would endanger the public interests, that the matters sought to be inquired into were privileged, and that his own official opinion accorded with the position taken, "and therefore he respectfully withdraws the application for attachment on behalf of the commonwealth." This position was sustained by the Appellate Court and

the attachment was set aside. The general principle was laid down, that whenever the law vests any person with the power to do an act, and at the same time constitutes him a judge as to the evidence on which the act may be done and contemplates the employment of agents through whom the act is to be accomplished, such person is clothed with discretionary power and is *quoad hoc* a judge. His mandate to his legal agents, on declaring the event to have happened, will be a protection to those agents. And such is the rule to be applied when the governor, as supreme executive and as commander-in-chief, is charged with the duty of suppressing domestic insurrections. "We had better at the outstart recognize the fact that the executive department is a coordinate branch of the government, with power to judge what should or should not be done within the limits of its own department and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere than the Executive under like conditions to interfere with the courts. Again the governor, having a proper regard for the dignity and welfare of the people of the commonwealth, is not likely to submit himself to imprisonment, on decree of the court of quarter sessions, or permit his officers and coadjutors to be imprisoned. Were we, then, to permit the attempt to enforce the attachment, an unseemly contest must arise between the executive and judicial departments of the government."[1]

[1] Hartranft's Appeal, 85 P. S. R., 433 (1877).

Text writers state the law to be that the President of the United States, the governors of the several states and their cabinet officers are not bound to produce papers or disclose information when, in their own judgment, the disclosure, on public grounds, would be inexpedient, and such is the doctrine of the English courts. In Burr's case Chief Justice Marshall said: "I suppose it will not be alleged in this case that the President ought to be considered as having offered a contempt to the court in consequence of his not having attended, notwithstanding the subpœna was awarded agreeably to the demand of the defendant; the court, would, indeed, not be asked to proceed as in the case of an ordinary individual." In an early case in Pennsylvania, compulsory process against the governor and secretary of the commonwealth was refused. In a New Jersey case a subpœna *duces tecum* having been served on the governor commanding him by his individual name to appear before an examiner in chancery, and bring with him an engrossed copy of a bill which had been sent to him for approval, he answered that he refused, not out of disrespect, but because he thought his duty required him not to appear, or produce the paper required, or to submit his official acts to the scrutiny of any court. The chancellor thought it might be proper for him to state the bare fact of the time of the delivery of the bill to him, but declined to make an order. "If the executive thinks that he ought to testify in accordance with the opinion of the court, he will do so without order: if he thinks it to be his official duty in protecting the rights and dignity of his office, he will not com-

ply even if directed by an order. It will be presumed that the chief magistrate intends no contempt, but that his action is in accordance with his official duty.''[1]

However clearly the division line between the executive and the judicial departments may be drawn in theory, there is no such clearly defined boundary in practice. To the courts are entrusted many functions which are executive or administrative in character. On the other hand judicial power is with increasing frequency conferred upon executive officers and especially upon executive commissions or tribunals which have power of adjudication and discretionary determination and which are assimilated in procedure to the courts and yet have absolute or arbitrary power —''power the corrupt or negligent exercise of which subjects the holder to no liability and the correctness of whose exercise cannot be reviewed in any court.''[2]

[1] Pending the prosecution of Private Secretary Babcock for complicity in frauds on the revenue, President Grant gave his deposition on behalf of the defendant. The secretary of the treasury and attorney-general attended for the United States. Chief Justice Waite acted as notary.

[2] Edmund M. Parker in Harvard Law Review, Vol. XX, 124.

CHAPTER V

THE EXECUTIVE AND THE LEGISLATURE

The constitutional principle prominent in the plan of the executive relation to the legislature is intimacy of communication. The governor is charged with the duty of giving to the legislature general information as to the condition of the state and its affairs. He is sometimes charged with the duty of making or submitting particular reports and estimates. He may recommend measures for their consideration. His acts and proceedings are open to the inspection of the legislature. No exception has been noticed to the requirement made from the beginning that these should be recorded in the journals of the councils of state or be preserved and recorded in the office of the secretary of state, and be laid before the legislature upon the call of either house. The state constitutions are framed upon the theory that the executive may have no secrets to which the legislature shall not have access. The federal practice is otherwise; from Washington's time the Executive has used a discretion in answering calls for information, particularly with reference to foreign affairs, and occasionally as to other matters, and the two houses usually recognize this distinction in the form adopted for expressing the request.

Authority is given to the governor to adjourn the two houses in case of their failure to agree in the matter of adjournment, and to convene the legislature upon extraordinary occasions[1] or in a different place, in case of danger of meeting at the seat of government by reason of disease or of the presence of the enemy. The latter provision though frequent, has not been general. The provisions of the constitutions as to a call of an extraordinary session are various. Some provide for a general call; others require that the purposes of the call shall be stated to the legislature when assembled; and still others that they shall be set forth in the proclamation by which the call is made. Several constitutions provide especially for calls of extra sessions of the Senate, but when such express authority is not given the inference is that one house may not be convened without the other. Some have made it mandatory upon the governor to call an extraordinary session upon application of two-thirds or three-fifths of both houses. In about half the states legislation at the extraordinary session is expressly limited to the purposes set forth in the governor's proclamation or message.[2] In the absence of an express constitutional limitation of the legislative action at the extraordinary session to the purposes set forth by the governor, the rule seems to be that the

[1] In North Carolina the consenting of the council of state is also necessary. In Louisiana the governor may also prescribe the maximum period of an extraordinary session.

[2] In three states the legislature may, in one case by a majority vote and in two by a large vote, extend legislation to other subjects when that specified in the case has

legislative power at such a session is that of the General Assembly in regular session and that it is not limited to the purposes set forth by the governor. As the constitutions do not define the extraordinary occasions on which the governor is authorized to convene the General Assembly nor determine what facts constitute a disagreement as to the time of adjournment, nor refer the settlement of these questions to any other department of the government, the governor must of necessity be himself the judge or he cannot exercise the power. The courts have no authority to review his decision, nor to question the validity of the measures taken by the Assembly when convened, on any allegation which questions the propriety of the call.[1]

As the great constitutional check upon the legisla-

been disposed of. It is held (People *v.* Blanding, 63 Cal., 333), that the Senate may ratify appointments, though not mentioned in the governor's recommendations, but by the same court, that the legislature may not at a special session propose constitutional amendments except upon the governor's initiative. (Am. Law Review, XLI, 399.)

[1] Whitman *v.* R. R., 2 Hars. (Del.) 514 (1839), 33 Am. Dec., 411. This decision has been effective since. "The doctrine that a mistake or even corruption on the part of the governor in convening the General Assembly invalidates the acts of that body would be productive of incalculable mischief." This opinion is somewhat qualified by a later decision (Farrelly *v.* Cole, 60 Kan., 356, (1899), where it is stated that if the Executive should act in such an outrageous manner in calling the legislature as to show clearly that he had not really used his discretion at all, the court might be justified in declaring the acts of the session void. See Amer. Law Review, XLI, p. 397.

ture is the veto (to which the next chapter is devoted), so the great legislative check upon the Executive, as well as all civil officers, is the power of impeachment. An impeachment is an accusation in writing presented by the Lower House of the legislature against an official, for an offence or offences, to the Upper House of the legislature, or, under exceptional constitutional provisions, to a special tribunal, upon which a trial is to be had. When the accusation is formally presented the accused is properly said to be impeached. If the accusation is sustained and judgment pronounced he is said to be convicted on impeachment. In some states suspension from office follows impeachment; in others the official status is not affected until the accused is convicted.

In England the earliest recorded instance of impeachment was about the close of the reign of Edward III. It was frequently resorted to during the next four reigns but between 1449 and 1620 there were no impeachments, partly from a decline in the influence of the Commons and partly from the preference which the Tudor princes had given to bills of attainder or of pains and penalties. There was a revival of the practice under James I. and from this time until the first overthrow of the Stuart dynasty, impeachments were of frequent occurrence. During this period the proceeding was often adopted as an instrument of faction, and it was through its use that the Parliament finally triumphed over the Executive, and parliamentary government with ministerial responsibility was formed. During the 18th century there were only

twelve cases of impeachment. During the 19th only one.[1]

In the United States an impeachment is usually considered to be in the nature of a criminal proceeding to be prosecuted in observance of the general principles of criminal procedure as administered in the courts of law. But some authorities consider it to be a proceeding of a political nature designed not so much to punish the offender as to secure the state by the removal of unfit persons from office. The proceeding is not within the provision of Magna Charta as to trial. While the state constitutions and the Federal Constitution expressly provide for it, the latter excepts impeachment from the provision as to trial by jury.[2] The Senate or other tribunal when organized for trial of an impeachment is a court of original, exclusive and final jurisdiction; the courts have no power to review or question the judgment of the Senate, and when once pronounced, the proceeding having terminated and the tribunal having risen, it is probable that the Senate, like other special tribunals and the courts of law under similar conditions, loses power over its own judgment.

In England all subjects of the realm were subject to impeachment; under the Federal Constitution and those of some of the states, none but civil officers are; under others of the state constitutions none but public officers. Some of the constitutions provide that state officers shall be liable, thereby excluding county and

[1] 15 Am. & Eng. Enc. Law, 1062, Title, Impeachment.
[2] Art. 3, sec. 23. Compare Amendment V.

municipal officers. In California the principal state executive officers, the justices of the Supreme Court and judges of the superior courts, are liable to impeachment for any misdemeanor in office. All other civil officers are to be tried for misdemeanor in office as the legislature may provide. Whether legislators are subject to impeachment is a disputed question. Senators have been held to be not civil officers of the United States within the meaning of the Constitution, because their appointment is derived from the states.

Whether an officer may be impeached after he has resigned is an unsettled question. The Senate proceeded with the trial of Ex-Secretary Belknap notwithstanding he had resigned before impeachment, but many of the senators voted not guilty on the ground of want of jurisdiction. In Nebraska, under the constitution and statutes, an officer who is impeached while in office may be tried though he resign or his term expire pending the proceeding, but the rule at common law in that state has been held to be that one who was not in office could not be impeached. Only civil officers are subject to impeachment: they are not such when not in office; an ex-official is a private person.[1]

There has been a conflict of opinion as to the nature of the offences for which an impeachment will lie. Some hold that it must be based upon indictable offences, others that it will lie for political offences, and as to offences under the Federal Constitution the matter is further complicated in consequence of the

[1] State *v.* Leese, 37 Neb., 92, 40; Am. St. Rep., 474 (1893).

general rule that there are no common-law offences against the United States. Accusations of crime in the federal courts must be based on federal statutes. It is believed that the "high crimes and misdemeanors" which are the subject of impeachment are not the only offences for which an indictment will lie, but that grave abuses of discretion, neglects or oppression or even grave impropriety of conduct indicating an unfitness to hold office are also indictable. Judge Addison was convicted on impeachment in Pennsylvania for preventing an associate judge from delivering his opinion upon a matter before the court, although the courts had previously held the alleged offence not to be indictable. In Massachusetts a similar doctrine has been held. Judge Barnard, in New York was convicted for granting *ex parte* injunctions contrary to law, for malconduct and corrupt conduct in granting injunction orders and appointing receivers, and for indecorous and indecent remarks and conduct while on the bench. The United States Senate has convicted upon charges of offences not indictable either at common law or under any federal statute, and the House of Representatives has always acted upon the theory that the misconduct charged might include other than offences against the common or statute law.

In Alabama, under the code of 1896, impeachment in the ordinary mode having ceased to be a part of the jurisprudence of that state, it is provided that the Supreme Court has original jurisdiction in some cases of impeachment and the county courts in others. The attorney-general in the former and the solicitor

of the circuit in the latter class of cases are required to institute the proceedings when the court shall order or when the governor in writing shall direct the same, or when it appears from the report of a grand jury that an officer ought to be removed from office for any cause mentioned in the code. When the proceeding is authorized by the statute, the institution of the proceeding is not vested in the discretion of the officer having the conduct of it. Under the constitution of Nebraska, the Senate and House of Representatives in joint convention have the sole power of impeachment; and the power to try impeachments is in the Supreme Court, except in the case of an impeachment of a judge of the Supreme Court, when the jurisdiction is in the district court. Under the constitution of New York, the court of impeachment is composed of the president of the Senate, who is the lieutenant-governor, the senators, or a major part of them, and the judges of the court of appeals or a major part of them. But on the trial of an impeachment against the governor or lieutenant-governor, the latter cannot act as a member of the court.

Conviction on impeachment is excepted from the power of pardon, the judgment extending no further than removal from and disqualification to hold office, and being in general no bar to a prosecution by indictment for the same offence in a court of law.

Legislative encroachment upon the executive by putting his discretion under constraint in passing upon bills has not been infrequent. One form of constraint is the passage of a bill having incongruous subjects, one of which may be regarded favorably, the

other not. In Rome under the republic "when a law comprised very various provisions relating to matters essentially different it was called *Lex Satura,* and the *Lex Cæcilia Didia* forbade the proposing of a *Lex Satura,* on the ground that the people might be compelled either to vote for something which they did not approve or to reject something which they did approve, if it was proposed to him in this manner."[1] In the instructions to Governor Barnard of New Jersey in 1758, it was required that laws be enacted without intermixing in one and the same act such things as have no proper relation to each other, that no clauses foreign to the title be inserted, and that so much of acts as are altered, continued or revised be particularly expressed in the enacting part. These ancient principles have now been generally incorporated in the modern, or recent state constitutions, and thus a form of coercion of executive discretion, as well as a means of perpetuating other abuses, has been corrected.[2]

The sharing of the appointive power with one branch of the legislature by the Executive deprives the executive office of its full independence and some of its efficiency and dignity in the commonwealths where the power at most is small. Moreover, the

[1] 3 Bohn's Cicero, pp. 22, 26.

[2] "In only two constitutions, and those recent, is the executive empowered to approve one or more parts of any bill whatever without approving the residue, but in a large and increasing number of states he has such power in the case of appropriation bills, the most usual provision permitting him 'to disapprove of any item or claims.'" Barnett Amer. Law Review, XLI, p. 385.

divided power is a most frequent source of controversy between the Executive and legislature or Senate. The filling of recess vacancies is an instance. The Federal Constitution as quoted in an earlier chapter provides that "the President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session,"—a provision which has been embodied in many of the state constitutions. Questions have arisen as to what is meant by "happening." Does a vacancy "happen" when the law has created an office which has not been filled when the legislature adjourns? Does it happen if the Senate has, during the following session, failed to confirm a recess appointment? The federal executive construction is that a vacancy happens whenever it is found to exist, or whenever it occurs, unless an office created during a session should have been left unfilled in that session and during the following recess, and no nominations have been made during the following session.[1] Provisions to meet this and other questions are found in some of the state constitutions. The Texas constitution of 1845 provided that if a nomination be rejected the same individual shall not again be nominated during the session to fill the same office. In case of failure to fill the vacancy during the ses-

[1] In the matter of a temporary appointment by the executive of the state, under provision of the Federal Constitution, to fill a vacancy in the Senate of the United States, the controlling decision is that the governor may not appoint if the legislature being free to act failed to make use of its opportunity to fill the vacancy.

sion it shall not be filled until the next meeting of the Senate. A rejected nominee shall not be renominated nor appointed again in recess. If the vacancy occur when the Senate is in session, the governor shall nominate before final adjournment, unless the vacancy occur within ten days of adjournment. Georgia, 1868, provides that a person once rejected by the Senate shall not be appointed by the governor to the same office during the same session or the recess thereafter. In the Louisiana constitution of 1868, there is similar provision. The Texas constitution of 1876 provides that if the appointment be made during the recess of the Senate, the appointee, or some other person to fill such vacancy, shall be nominated to the Senate during the first ten days of the session. If rejected such office shall immediately become vacant and the governor shall without delay make other nominations until a confirmation takes place. But should there be no confirmation during the session of the Senate, the governor shall not thereafter appoint any person to fill such vacancy who has been rejected by the Senate, but may appoint some other person to fill the vacancy until the next session of the Senate or until the next election to the office, should it sooner occur. These provisions serve to indicate the various controversies which may arise under the provisions as to recess vacancies in their general form of expression.

The right to make appointments to office is not inherently and exclusively an executive function—though, as has been stated, the power of appointment is in its nature executive. It depends upon express constitutional provisions and does not extend beyond

these provisions and the laws enacted pursuant thereto. The ordinary distributive clause, providing for the separation of powers is insufficient to vest the appointing power solely in the governor. Long and settled legislative practice has fixed this interpretation, and acts vesting a power of appointment in judicial officers have been sustained. When the Constitution provides, as is usual, that "the governor shall appoint all officers whose appointment or election is not otherwise provided for unless a different mode of appointment be provided for by the law creating the office," this means simply that the governor shall have the power to fill all offices in the state, whether created by the Constitution or the act of the legislature unless otherwise provided by the one or the other. When therefore the legislature has created an office in the same law it may be designated by whom and in what manner the person who is to fill the office may be chosen. And if some mode of appointment is not thus designated, the governor, by virtue of the constitutional authority, makes the appointment or a new legislative designation may be subsequently made.[1]

Sometimes the legislature is expressly excluded by the Constitution from the power of appointment; such a provision does not, however, prevent it from creating a board composed of state officers who become members thereof *ex officio,* but where such provision exists a statute authorizing the president of the Senate and speaker of the house to appoint proxies and directors for the state in all corporations in which the

[1] Davis *v.* State, 7 Md., 151, 61; Am. Dec., 331 (1854).

state is a stock-holder, is invalid. The intended effect of such a statute has been interpreted to be the creation of an office and an appointment to the same.

A public office is an agency of the state, and the person whose duty it is to act in this agency is a public officer.[1] But although appointment to office may be an act of an executive nature it does not follow that the legislature cannot exercise an appointing power or confer it upon others than the Chief Executive, when the Constitution by express negative words does not limit the legislative power in this regard.

So far as the executive power is vested in the chief magistrate, and so far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution, through impeachment; but the legislature may impose upon any executive officers any duty it may think proper which is not repugnant to any rights secured and protected by the Constitution; and in such cases the responsibility and duty grow out of the law. Such statutory duties and responsibilities may be imposed by the legislature upon the governor himself, by constituting him a member of administrative boards; and this has been the practice in many of the states. A review of the legislation of the last few years shows the material increase of the governor's power through the creation of new officers whose appointment has been placed by the legislature almost invariably in his hands.[2]

[1] State *v.* Stanley, 66 N. C., 59; 8 Am. Rep., 488 (1872).

[2] Yearbook of Legislation, N. Y. State Library, 1903, 1904, 1905.

As to executive duties in general, it cannot be contended that duties imposed by law are not official duties of an executive department because the legislature might have entrusted them to another department. It does not follow that an act cannot be the official act of a department of the government because other persons might lawfully have performed the act if performance had been by law entrusted to them. Thus courts, for example, have been authorized to lay out highways, or money is directed to be laid out under a certain supervision upon public work. The duty is not necessarily to be performed by an executive department of the government under any provision of the Constitution.[1]

And so as to the power of appointment to office. The power of appointment or election does not necessarily and ordinarily belong to either the legislative, the executive or the judicial departments. It is commonly exercised by the people, but the legislature may, as the law-making power, when not restrained by the Constitution, provide for its exercise by either department of the government, or by any person or association whom it may choose to designate for that purpose. It is an executive function when the law has committed it to the Executive, a legislative function when the law has committed it to the legislature, and a judicial function, or at least the function of a judge, when the law has committed it to any member or members of the judiciary. When by the constitution the distribution of powers is express, it must

[1] Rice *v.* Austin, 19 Minn., 103; 18 Am. Rep., 330 (1872).

nevertheless be considered that there are functions which are often performed by any one of the departments of such a character that their performance does not necessarily belong to it alone; where such is the case, the authority of the department is not necessarily exclusive and another department may be required to perform the same or a similar function.[1]

[1] Fox *v.* McDonald, 101 Ala., 51; 46 Am. Rep., 98 (1892). But there are adverse authorities.

CHAPTER VI

THE VETO AND APPROVAL OF BILLS

While the American Executive has no power to initiate legislation, except as he may determine in some states, and in the National Government as well, the subjects upon which the legislative body may deliberate and act, he has, as a rule, an important legislative function in his possession of the veto power, the power to prevent the enactment of a bill into law unless it receive his approval or be repassed, usually by a large majority, notwithstanding his objections.

In the colonial period the governors all had the power of veto and in all cases where it was exercised it was absolute. In all the colonies, save Maryland, Connecticut and Rhode Island, the king could prevent the enactment of a bill even after it had been approved by the governor. And so frequently and vexatiously had king and governor negatived legislation "most wholesome and necessary for the public good" that when the colonies came to make their constitutions as independent states they refused to grant the veto power, except in one state, to the newly made executive.[1] But in the framing of the Federal Constitution this power in modified form, was revived, the President being empowered to employ not the ab-

[1] Woodburn, The American Republic, p. 147.

solute but the suspensive veto. It was the early interpretation of this power that it should be used merely to protect the Constitution and the Executive department from legislative encroachment, but it has come to have wider employment and to give the President under the broader interpretation and use, a share with Congress in the responsibility for legislation.[1]

The suspensive veto is also granted to the Executive by all the state constitutions save two, those of North Carolina and Rhode Island, Ohio having conferred this power in 1903. The motive, in part at least, for this conferment of power to negative or at any rate stay the action of the legislature has been stated above.[2] The power is very generally exercised, and liberally where the Executive and legislative branches are not in political accord.

The vote required to enact a bill into a law, over the veto of the Executive,[3] has frequently been a majority; either of the whole number elected to each house, or a majority of the whole number, or a majority of each house. A two-thirds majority is, however, usually required, either of "that house" or

[1] Woodburn, The American Republic, p. 149. See also pp. 206 *et seq. infra.*

[2] See p. 48, *supra.*

[3] The new constitution of Virginia has this unique provision: "If the governor approves the general purpose of a bill, but disapproves a part, he is expressly authorized to return it with his recommendations for amendment. . . . The legislature may amend the bill in accordance with the governor's recommendations by a mere majority of the members present in each House, instead of two-thirds required to repass bills in general over the veto." Am. Law Rev., Vol. XLI, p. 393.

"of the members present," or "of the whole number elected," or "of all the members," as variously phrased. Three, five, six and ten days, are given for deliberation. If the Executive does not approve a bill and does not return it with his objections within the prescribed period it becomes a law unless the adjournment of the legislature prevents the return. The usual provision is that in case the return of the bill is prevented by adjournment, it shall not become a law. Sometimes, however, it is required to be returned on the first day or within the first three days of the next session of the legislature; sometimes provision is made for the filing of the bill with objections with the secretary of state within a fixed time after adjournment. Pennsylvania, 1873, and Texas, 1876, add to this the requirement of a notice of the same by proclamation. The constitution of New Jersey of 1844 provides that neither house shall vote upon a bill on the day on which it is returned to it. The Indiana constitution of 1851 provided that when a bill was filed by the governor with his objections after adjournment, with the secretary of state, that officer should lay the same before the General Assembly at the next session in like manner as if it had been returned by the governor. The Missouri constitution of 1875 provides that "when a bill has been signed as provided for in the preceding section by the presiding officers of the respective houses, it must be presented by the proper officer of the house in which it originated, in person to the governor, on the day on which it was so signed and the fact shall be entered on the journal." A provision that the governor shall have the power to disap-

prove of any items or item of any bill making appropriations of money,[1] embracing distinct items, and that the parts of the bill approved shall be the law, and the items of the appropriation disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of other bills over the Executive veto, is common in the later constitutions and has been added to some of the earlier by amendment.[2] The usual definition of what shall be submitted to the governor for approval is as follows: Every bill and every order, resolution, or vote to which the concurrence of both houses may be necessary. There is, however, in almost all cases, exemption of certain subjects from the Executive veto, such as the question of adjournment, amendment of constitution, referendum measures; and questions relating to the conduct of the business of the two houses.

There is some diversity of opinion and practice in the states as to presentment of bills to the governor for approval. In Massachusetts the bill must be presented to the governor personally; in New Hampshire it may be left at his office with the person in charge; in Louisiana it is presented when offered or tendered to the governor or his secretary. A valid

[1] In the state of Washington the restriction is not to appropriation bills; the governor may veto any section of any bill.

[2] This provision is now made in 28 states, and its desirability has been urged in the recent messages of governors of some of the other states. "At the same time it is not possible for the legislature to deprive the executive of his veto power by enacting ordinary legislation in the form of constitutional amendments." 1 Am. Law Review, XLI, 223.

presentation has been made, whatever the varied detail of the requirement, when the bill has passed from the possession of the legislature or its messengers and has been left with the governor for his consideration.[1] An entry should be made of the time of presentation; in some states where no mode is prescribed, the practice is for the governor to make an entry on the bill itself. In others it is made on the journal of the legislature. The Maryland code provides for the entry on the back of the bill, in the governor's presence, of the day and hour of presentation and an entry on the journal of the house in which the bill originated. An entry of the fact by the secretary of state is competent, as it is his duty to record the acts and proceedings of the executive. When the bill is presented, the necessary precedent conditions must have been complied with, as, for example, it must have been engrossed and signed by the presiding officers of both houses, when, as in most of the states, this is a constitutional requirement. "There are three things required by this section to be done in relation to bills before the duty of the General Assembly ends and that of the executive begins. They must pass the bill, they must seal the bill with the great seal of the state, and they must present the bill to the governor; and when all this is done, and not till then, the duty of the governor begins. All these are conditions precedent, to be performed by the legislature before his constitu-

[1] And the mere refusal of the governor to receive the bill cannot prevent a valid presentation. Otherwise the executive would have power to delay at his own will the presentation of a bill. State *v.* Secretary of State, 52 La. An., 936 (1900).

tional duties imperatively require the governor to act. We cannot disregard what we consider plain and unambiguous language and substitute in its place supposed intentions or erroneous practice."[1] There are decisions to the effect that after presentation to the executive the bill cannot be recalled by the legislature, but in practice such action is common and has been held valid. Neither house can, however, without consent of the other, recall a bill after its transmission to the governor.

The time within which the governor must act is computed by excluding the first and including the last day. The constitutions usually exclude Sundays, and it has been held that such exclusion may be implied.[2] When the governor by statute is entitled to one day, previous to the adjournment of the legislature, for the examination and approval of bills, this is to be understood as full twenty-four hours before the hour of adjournment.[3] The five days allowed the governor in New Hampshire for the return of bills which have not his assent, include days on which the legislature is not in session if it has not finally adjourned.

The approval must be of the bill as a whole, unless the constitution otherwise provides,[4] as in the case of items of appropriations. In Pennsylvania it has been decided that the governor may reduce the item of an appropriation by approving it for a specified

[1] Hamilton *v.* State, 61 Md., 14.

[2] If the limitation does not exceed one week. State *v.* Michel, 52 La. An., 936; 78 Am. St. Rep., 364 (1900).

[3] Texas and see *supra.*

[4] See notes p. 75, *supra.*

amount less than that appropriated, and disapprove it as to the remainder.[1] To admit of the disapproval of an item of an appropriation bill, it must be distinct and separable. An unauthorized disapproval, as of a part of a bill, is ineffective, and it becomes a law nevertheless. When a bill is approved the position of the signature is immaterial and the fact of approval is a matter of judicial notice.

Until the governor has lost the possession and control of the signed bill, he may withdraw his approval, but not afterwards. When approved and filed with the secretary of state, it has passed from the governor's control, and the approval is final, although the time limited for the return of the bill has not expired. The governor of Illinois put his signature to a bill, supposing it to be another bill, which latter he intended to approve. His private secretary, as a matter of routine, without special direction, reported the approval of the signed bill to the legislature. This error becoming known to the governor, he sent a message to the speaker of the house, making known his inadvertence, and the same day erased his signature and returned the bill with a veto message. It was held that the bill did not become a law, since it had been retained in the governor's possession and had not been deposited in the office of the secretary of state as the law.[2] The act of reporting the approval to the house where the bill originated was merely an act of formal courtesy, without legal significance or effect. Such notification of approval is usual, but the

[1] 199 Pa. St., 161 (1901).

[2] People *v.* Hatch, 19 Ill., 283 (1857).

decisions are in agreement that the act is one of courtesy and not of law or duty. A return of the bill, with objections, by the private secretary of the governor, acting under the latter's instructions, was held sufficient in Massachusetts, though the executive himself was absent from the state, and the lieutenant-governor was acting in his place during his absence. Another decision of interest is that when on the tenth day the governor sent a bill with his objections to the house in which it originated, and the messenger, finding the house had adjourned for the day, returned it to the governor who retained it, it was held that to prevent the bill becoming a law it should have been left with the proper officer of the house. The return must be such as to put the bill beyond executive possession and in actual or potential possession of the house, so that the house may reconsider it.[1] "On the other hand, the house may not, by adjournment for the day, prevent such a return and thereby deprive the executive of his veto power."[2]

The adjournment which prevents the return of a bill under the constitutional provisions is an adjournment *sine die*, not a recess.[3] The approval of a bill made during a recess is valid. It has been held that in the approval of bills the governor is a component part of the legislature, and unless the constitution allows further time for the purpose he must exercise his power of approval before the two houses adjourn or his act will be void. In several of the

[1] Harpening *v.* Haight, 39 Cal., 189 (1870).

[2] Am. Law Rev., 41, 391.

[3] La. Abra. Co. *v.* U. S., 175 U. S., 423 (1899).

states, a contrary doctrine is held, and action on the bill by the governor within the period limited for the return of the bill is held valid. It is not in accordance with the Federal Executive practice for the President to act upon bills after the adjournment of Congress. President Lincoln signed an "abandoned and captured property" act after the adjournment of Congress and it was duly published as a law, but judicial action under the act was postponed until Congress by a subsequent enactment supplied its provisions. With this exception, not only the practice but the distinct utterances of the Presidents have been the other way. The question has not been judicially determined as a federal question but in a case arising under similar provisions of the constitution of Illinois, Chief Justice Waite sustained the validity of approval after adjournment and within ten days of presentation, by a course of reasoning tending strongly to sustain such action under the Federal Constitution.[1]

It is not necessary that the Executive should add the date of signature to his approval, although such is the usual practice. The courts will ascertain the date by taking notice of extrinsic facts, as, for example, the journal of the legislature, in which is noted an executive message showing the date of approval.[2] And when it becomes necessary for the purposes of justice, the precise moment in the day on which the signature was affixed may be shown. Generally the law does not regard fractions of a day, and a statute is treated as if in force during the whole of the day

[1] Seven Hickory *v.* Ellery, 103 U. S., 423 (1880).
[2] Gardner *v.* Collector, 6 Wall, 499 (1867).

on which it was signed, but it will not be given a retrospective operation for even a fraction of a day to the prejudice of private right.[1]

In an early English case it was said: "The act being a high record, must be tried out by itself, *testa me ipso*. Now journals are no records; they are not of necessity, nor have they always been"; and so it was held that the courts could not go beyond the authentication of the act for the purpose of testing the validity of any of its provisions by the journals of the legislature or other extrinsic means. The English rule has been followed in many of the states and the engrossed bill as signed by the Executive and deposited with the secretary of state is held to be conclusive evidence of what the law is. The validity of the Dingley Tariff Act of October 1, 1890, was assailed for the reason, as alleged, that in engrossing the bill a clause known as "section 30," relating to a rebate of taxes on tobacco, which was shown by the journals of both houses of Congress to have been regularly passed, was omitted, and that, therefore, the engrossed act as attested by their presiding officers, approved by the President and deposited with the secretary of state, was not the bill which passed Congress and was not therefore a statute of the United States. But the court declined to go behind the authenticated statute and held the act to be valid.[2] In

[1] See, for example, U. S. *v.* Stoddard, 89 Fed. Rep., 699; Burgess *v.* Salmon, 97 U. S., 381 (1878).

[2] Field *v.* Clark, 143 U. S., 649 (1892). A note to this case contains an elaborate collection of the cases in the several states.

states in which journals are required by the constitution to be kept and published and to show compliance with certain requirements in the enactment of laws, it has been held that the courts would judicially notice the journals and if non-compliance with the constitution appeared manifestly and affirmatively, the statute would be declared void.[1] Mere silence of the journals will not avail for this purpose, for in such case compliance with the Constitution will be presumed. Where part of an approved bill is shown to be spurious, in those jurisdictions in which the journals are resorted to, the whole act is held void unless the genuine part is clearly severable and independent.[2]

[1] Osborn *v.* Staley, 5 W. Va., 85; 13 Am. Rep., 640 (1871).

[2] See for example, Moody *v.* State, 48 Ala., 115; 17 Am. Rep., 28; State *v.* Deal, 24 Fla., 293; 12 Am. St. Rep., 204; Berry *v.* B. & O. R. R., 41 Md., 446; State *v.* Platt, 2 S. C., 150; 16 Am. Rep., 647.

CHAPTER VII

PARDON

In its simplest form the grant of the pardoning power to the Executive in the constitutions is: "To grant reprieves and pardons for offences except in cases of impeachment." As, in general, the power to pardon may be exercised as well before as after conviction, it is common to find the grant qualified by the phrase "after conviction." Treason or treason and murder are often added to impeachment as exceptions; as to these, when excepted, a power of reprieve is given so that the pardon of these crimes may be referred to the advice and consent of the Senate, or to the action of the General Assembly. When the remission of fines and forfeitures, otherwise included in the general power of pardon, is mentioned, it is usually with the added provision "under such regulations as may be prescribed by law." In some of the constitutions the power to pardon is to be exercised by and with the advice and consent of the Senate, or, where there is an executive council, with its concurrence. Sometimes the power is vested in general terms, but under such restrictions as may be prescribed by law. In Connecticut, 1818, only the power to reprieve until the end of the next session of the Assembly, was granted. In other states it is provided that the manner of ap-

plication for pardon may be regulated by the legislature. In Maryland, 1876, it was provided that notice should be given in one or more newspapers of applications for pardon or *nolle prosequi*. In Mississippi, 1890, the applicant must advertise his petition for pardon, giving the reasons.[1] A requirement that the governor shall communicate to the legislature the particulars of pardons granted, including the reasons therefor, is common. Texas, 1876, required that the reasons should be filed with the secretary of state. In New Jersey, 1844, it was provided that the governor, chancellor, and six judges of the court of errors and appeals or a majority of them, the governor being one, might remit fines and forfeitures, and pardon after conviction, except in cases of impeachment, and that the governor might reprieve, not exceeding ninety days, except in cases of impeachment.[2] In Indiana, 1851, it was provided that the General Assembly might by law constitute a council to be composed of officers of state, without whose advice the governor should not have the power to grant pardon in any case except such as might by law be left to his sole power. In Nevada, 1864, it was provided that the governor, judges of the Supreme Court and attorney-general, or

[1] In Arkansas in 1903, an act was passed providing that applications must set forth grounds, lists of petitioners, proof of publication for two weeks in the county where conviction was had and in the county where the offence was committed; but the governor may on his own motion pardon without publication.

[2] A constitutional amendment, 1903, to make the Court of Pardons consist of the governor, chancellor and attorney-general, or two of them, was rejected by the people.

the major part of them, of whom the governor should be one, might pardon, except in cases of treason or impeachment, subject to legislative regulation as to the manner of application. The governor might reprieve for sixty days, and suspend sentence for reason awaiting action by the legislature. A similar provision was made in Florida in 1868. In Pennsylvania, 1873, the governor acts upon the recommendation in writing of the lieutenant-governor, secretary of the commonwealth, attorney-general, and secretary of internal affairs, made after hearing, on public notice, in open session; and such recommendation, and reasons, are to be filed and recorded in the office of the secretary of the commonwealth. In Louisiana, 1898, pardons are granted on the recommendation of the lieutenant-governor, attorney-general and presiding judge, or any two of them.

At the time of our separation from Great Britain, the power to grant reprieves and pardons had been employed by the king as chief executive and the colonies had been accustomed to the use of it in various forms. Hence where the words to grant pardons were used in the Constitution they referred to the authority as exercised by the English Crown or by its representatives in the colonies. Chief Justice Marshall said: "As the power has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by

the person who would avail himself of it."[1] And in Pennsylvania Justice Sargeant said: "No principle is better settled than that for the definition of legal terms and construction of legal powers mentioned in our Constitution and laws, we must resort to the common law when no act of Assembly or judicial interpretation or settled usage has altered their meaning. A pardon, therefore, being an act of such a nature as that by the common law it may be upon condition, it has the same nature and operation in Pennsylvania, and it follows that the governor may annex to a pardon any condition, whether subsequent or precedent, not forbidden by law."[2]

Whether the power to pardon is an exclusively executive function has been much debated, and authorities may be found for either contention. It is assumed in all the constitutions that it needs to be conferred on the executive in order to be rightfully exercised. Under the Federal Constitution legislation has conferred upon the secretary of the treasury the power to remit fines and forfeitures. The practice commenced in 1797 and was in accordance with legislation in England, which, without interfering with the power of pardon belonging to the crown, invested certain subordinate officers with authority to remit penalties and forfeitures arising from violations of the revenue laws of that country; it was upheld by the Supreme Court in 1885, as justified by such a long practice and acquiescence as to amount to a settled

[1] U. S. *v.* Wilson, 7 Peters, 150 (1833).

[2] Flavell's Case, 8 Watts & S., 197. And see *Ex parte* Wells, 18 How., 37 (1855).

interpretation of the Constitution. But the power of pardon conferred by the Constitution upon the President is unlimited, except in cases of conviction of impeachment. "It [the power of pardon] extends to every offence known to the law and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any class of restriction."[1]

Decisions are contradictory as to whether the legislature may remit a fine, but it would seem that it has a general power to discharge any debtor of the state from his obligation. Giving persons convicted and fined the benefit of the insolvent laws is not an exercise of the pardoning power.[2] Deductions from time of prison service for good behavior, to be adjudged by the prison board or other such authority, as affecting sentences imposed before the passage of the act, have been held to be encroachments upon both the executive power of pardon and the judicial power to sentence, but as to subsequent sentences they have been sustained. Legislative regulations as to applications for pardon are merely directory and the pardon is valid though they be not observed. But where the constitution provides for legislative regulations, as is frequently the case as to fines and forfeitures,

[1] *Ex parte* Garland, 4 Wall. 333 (1866).

[2] *Ex parte* Scott, 19 Ohio, 581.

the observance of them is essential. Where the constitution vests the power to pardon after conviction in the governor, the legislature may pardon before conviction and an act of amnesty is valid. In sustaining such a law the Court argued that the power to pardon in general was not necessarily an executive function but in the nature of a dispensing power.[1]

Judicial power to suspend sentence is inherent by the common law and is not in conflict with the executive power to grant reprieves and pardons. "A contempt of court is an offence against the state, and not against the judge personally. In such a case the state is the offended party and it belongs to the state, acting through another department of the government, to pardon or not to pardon, at its discretion, the offender. We can scarcely think it compatible with the genius of liberal government and free institutions that there should be no shield to protect an individual against a tyrannical exercise by a judge of his power to punish for contempt."[2] In Mississippi, the governor having pardoned such a prisoner, and the sheriff having released him, the Circuit Court ordered his rearrest, but the High Court of Errors and Appeals ordered his release, as the crime, being an offence against the state, was within the pardoning power. But it is well settled that imprisonment, as for contempt, for the purpose of enforcing remedial civil rights, or for coercing a contumacious witness, is not

[1] State *v.* Nichols, 26 Ark., 74; 7 Am. Rep., 600 (1870); but see State *v.* Glass, 25 Mo., 291; 69 Am. Dec., 467 (1857).

[2] State *v.* Sauvinet, 24 La. Ann., 119; 13 Am. Rep., 115 (1872).

within the pardoning power, by reason of the private interest in the remedy, as for example, an attachment for disobedience of a writ of *mandamus* commanding the levy of a tax. This distinction is well settled under the federal authorities, and the President has frequently exercised the power to pardon for criminal contempts.[1]

A pardon may be absolute, or conditional,[2] or partial, or implied. Instances of the latter are rare, but the promotion of an officer under an unexecuted sentence of a court-martial is one of them. Sir Walter Raleigh pleaded his commission by the king as an officer in the navy on his arraignment for sentence for high treason, but it was held that, though the commission might operate as an implied pardon for an ordinary felony, a pardon for treason must be express. A commutation of sentence simply mitigates the penalty. It does not, like a pardon, remit the punishment, and create in the offender a new credit and capacity. Amnesty is the pardon of a class of persons by law or proclamation. In January, 1869, the Senate by resolution requested President Johnson to transmit to the Senate a copy of any proclamation of amnesty, made by him since the last adjournment of Congress, and also to communicate to the Senate by what authority of law the same was made. He transmitted a copy of the amnesty proclamation of December 25, 1868, and referred to his constitutional

[1] And see *Ex parte* Kearney, Wheat., 38 (1822). The power was doubted in *In re* Nevitt, 117 Fed. Rep., 488 (1902).

[2] But governor of Georgia in 1901 asks legislature to make rules for the granting of such pardons.

authority and the precedent established by "Washington in 1795, and followed by President Adams, in 1800, Madison 1815, Lincoln 1863, and by the present Executive in 1865, 1867 and 1868."

A pardon is an act of grace. It can not be demanded as of right, and the power to pardon must be exercised by the proper authority. Where the office of governor is temporarily administered by another under constitutional authority, he exercises the power of pardon. Where the right to the governorship is in dispute, and two persons are claiming and exercising official powers, the valid authority is that which is determined to be the *de jure* authority and a pardon issued by the other is void. A pardon board is an advisory council. It is not a court. "It has before it no parties, it hears no evidence, it declares no law and it can render no judgment." The power to pardon is not exhausted by a partial exercise but may be again used for any remaining portion of the sentence. It is not operative upon moneys in the treasury or beyond executive control, nor can it affect or divest the vested interests of third persons. It is limited to the specific offence or offences intended and is liberally construed in favor of the recipient. It becomes operative upon delivery and acceptance; it may be rejected, but acceptance is presumed when the sentence is commuted, and is dispensed with when the offender has become insane. It may be revoked before delivery, which is complete when it reaches the warden of the prison having the prisoner in custody; and if the warden return the pardon to the governor it is operative nevertheless.

Pardons may be granted upon condition [1] and if the offender fails to perform the condition, the original sentence remains in full force and may be carried into execution. But upon a supposition of breach of the condition, the governor is without authority to cause, upon his mere warrant, the arrest and commitment of the party. From the earliest date the practice in England and America, in the absence of a statutory regulation, has been that there must be a warrant issued upon a complaint on which the party may be arrested and held for a hearing before a court of criminal jurisdiction, following some rule or form of proceeding on which he is brought before the court to show why execution should not be awarded against him. The record of his conviction is then produced and the first question is whether he is the same person who was convicted. If he pleads that he is not, *venire* must be awarded for the trial of the fact by a jury. If his identity is found or not denied, the question is upon the breach of the condition, on which he may be heard by the court in a summary way and on which he may present any facts tending to excuse the non-performance of the strict terms of the condition; and if the question appear to be doubtful it has sometimes been the practice to take the verdict of a jury. According to the course of the common-law practice the only issue that must be tried by a jury is that of identity, so as to prevent the punishment of one who had never been tried; but upon other questions no

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[1] In North Carolina, for example, the legislature of 1905 authorized the governor to grant conditional pardons.

greater formalities are required than when the prisoner is brought up for original sentence.[1]

Pardons obtained by fraud are void, and where it may be fairly inferred from the language of the pardon considered in connection with the record of the trial, that the executive was imposed upon by those forwarding it, by misrepresentation, or concealment, the pardon is void. The authorities are not in accord as to whether a pardon fair on its face may be collaterally questioned upon *habeas corpus*.

A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence; it restores him to all his civil rights,[2] makes him, as it were, a new man, and gives him a new credit and capacity.[3]

[1] State *v.* Walfer, 53 Minn., 135; 39 Am. St. Rep., 582 (1893).

[2] Save in Alabama where the offender is not relieved of civil or political disability unless it is so specifically expressed in the pardon. Stimson, The State Constitution, III, § 162.

[3] *Ex parte* Garland, 4 Wall, 380 (1866).

CHAPTER VIII

APPOINTMENT AND REMOVAL

As already set forth the power of appointment to office is not an inherent executive power, but depends upon and is governed by constitutional provision or legislative enactment. When conferred by the constitution, it of course cannot be abridged by legislative authority but when conferred by legislation it is subject to legislative control. And so as to the power of removal from office;[1] modes of removal may be prescribed by the constitution, as by impeachment, legislative address or otherwise; but when the offices and the official tenure are created and prescribed by the constitution which also prescribes for the removal of the incumbents of such offices by impeachment or address, these modes are exclusive and the legislature cannot provide for or cause removal by other means.[2] But where the office is created by legislation the rule is generally otherwise.

Office is not a contract relation and is not within

[1] "This power is as a rule confined to the officers whom the governor appoints; though in New York he is permitted to remove all 'state officers'; and local officers are seldom removable by the governor except in New York' where the power to remove local officers is quite large." Goodnow, Comparative Administrative Law, p. 79.

[2] Commonwealth *v.* Gamble, 62 P. S. R., 343 (1869).

the provision of the Federal Constitution forbidding the impairment of the obligation of contracts. When it exists by legislative provision, it is, in all its incidents, fully subject to legislative control. When the tenure of office is during the pleasure of the appointing power, or is not otherwise defined, the power to appoint includes the power to remove. A number of state cases hold that when the appointment depends upon the concurrence of another body or authority the power of removal depends likewise upon the same concurrence, as in the case of an appointment by and with the advice and consent of the Senate. The Pennsylvania constitution provides that certain officers may be removed at the "pleasure of the power by which they shall have been appointed." An officer whose appointment is made by and with the advice and consent of the Senate may, under this provision, be removed by the governor acting alone. The power of removal is here expressly given; it does not, as in other constitutions, depend by implication on the power to appoint. The act of appointment is the act of the executive in granting the commission and as this act is his the power of removal is also his.[1]

The appointment is not completed by the advice and consent of the Senate, and the Senate has the power, at the same session and before any other action on the subject has been taken, to reconsider its vote and refuse its consent, but it can not do this at a subsequent sitting. The commission of the officer may be withheld, notwithstanding the concurrence of the

[1] Commonwealth *v.* Lane, 62 P. S. R., 343 (1869).

Senate, but the execution of the commission, even without delivery, is sufficient to vest the title to the office in the appointee. In the case of appointed officers the commission is, as a rule, the sole evidence of title to the office, but as to elected officers another rule prevails. The Senate may act upon an appointment at a regular or extra session, and the limitation of legislative action to the matters set forth in the proclamation calling an extra session does not affect this power.[1]

In the United States the President, the governors of the states, and other high officials are not personally liable in civil actions for acts done by authority of law and within official discretion. This immunity extends to and insures subordinate officers without regard to motive, although some of the authorities hold the officer to be liable where there is malice or corruption, as, for example, where an election board, vested with a power of decision, wrongfully and corruptly rejects a vote. As to merely ministerial officers the rule is more stringent. An officer of this type is liable although he mistake his duty or neglect or refuse to do an act which the law requires. That he believes the law to be unconstitutional is no excuse. When he executes an order, regular upon its face, he is not in general, liable if the superior officer or tribunal had the power or jurisdiction to issue it, although error may have been committed in reaching the judgment or conclusion on which the order was based.

[1] See above, pp. 58, 59.

An officer is not liable on a contract made by him in his official capacity unless it clearly appears that he intended that a personal liability should be created, even though the contract is ineffectual to bind the government for want of complete authority or from failure to comply with the legal prerequisites to its execution. If the officer fraudulently misrepresents his authority or compliance with the law he may be liable for the deceit. He is not liable for the misconduct of his official subordinates unless in some way personally concerned in the act in question.

As a general rule an officer is criminally liable at common law for malfeasance, misfeasance or nonfeasance in office, but not where he acts judicially or in the exercise of a legal discretion, unless it be shown that he acted from some motive of malice, partiality or corruption. Legislators, judges of courts of record, and high officers of state are, however, not usually criminally liable for official acts except by impeachment.

A recent decision[1] as to the veto power of the governor in cases of constitutional amendments, presents in an interesting way the stringency of the obligations of official duty upon high officers of state. The governor interposed his veto of the constitutional amendments after the legislature had adjourned and caused them to be filed with the secretary of the commonwealth with his objections in accordance with the constitutional rule and practice in the case of bills. The amendments passed the legislature in April, 1899;

[1] Comth. *v.* Geist, 196 P. S. R., 396 (1900).

the constitution required such amendments to be published by the secretary of the commonwealth three months before the next general election, in at least two newspapers in every county, so as to inform the voters, in order to action by the next General Assembly, whose passage of the proposed amendments would operate to incorporate them into the constitution. The next general election after this date was in November, 1899. The secretary failed to act and proceedings by *mandamus* were instituted against him which reached the Supreme Court and were heard there in May, 1900. For the secretary it was argued that he had recognized the veto power of the governor, that no appropriation had been made by the legislature for the publication in question, that there were no available funds in the treasury not otherwise appropriated out of which such expenses could be paid, that his contracts for such publication in the absence of an appropriation would therefore be without warrant of law, and that now, in 1900, it was impossible to comply with the constitutional requirement as to advertising because the time for "the next general election" had passed. Holding the objection of the governor to have been nugatory the court proceeded: "Two other questions arose upon the hearing in the court below and they are brought before us by this appeal. The first of them is that as no appropriation was made of moneys from the public treasury to defray the cost of publication in the newspapers, the secretary of the commonwealth could not make the publication. We do not consider that this question has any serious force, because in the first place it

does not appear and is not averred that any newspapers have refused to make the publication without being paid or secured for the cost, or even that any of them have been asked to make the publication. The secretary is not therefore able to say that he cannot make the publication for the reason stated, and hence such inability cannot be set up as a bar to the enforcement of the act proposing the amendments."[1] The court held that at least an effort to comply must be shown; that it could not be supposed that the legislature would fail to perform its duty to make appropriation for the expense incurred; that the next general election might well be construed to mean the approaching general election for members of Assembly, the first to occur after the amendment was proposed and that even if a literal compliance with the requirement as to the date had become impossible without the default of the power which created the duty, the publication might still be made as nearly as possible in accordance with the original intention.

Where an officer is appointed during pleasure, or where the power of removal is discretionary, the removal may be made in a summary manner. But where the appointment is made during good behavior, or where the removal must be for cause, removal is legal only after charges have been made against the accused officer, and after notice and a reasonable opportunity to be heard before the officer or body having the power to remove. This is the general doctrine held by English authorities and in

[1] Commonwealth *v.* Geist, 196 P. S. R., 396 (1900).

many of the states. There is authority to the effect that the existence of cause is a judicial question which must be determined by the courts, but the weight of authority is the other way. For, although the power to remove from office for cause is in its nature judicial, in so far as it requires a judgment reached by that due process of law which proceeds upon inquiry and decides after notice and hearing, yet it is not such as is required to be vested in the judicial department, so as to require the judgment of a court to be had in order to constitute a foundation for the executive act of removal. Legislative control over the tenure of offices created by statute includes the power to provide by law for removal. The power is in its nature political and has reference exclusively to the polity of government, which would be inherently defective if no remedy of a summary nature could be had to remove from office a person, who after his election or appointment had been convicted of crime, or who was guilty of malversation in the administration of his office. The causes, the charges, the investigation and the manner and agency of determination, are all in the discretion of the legislature, and may by it be committed to the governor.[1]

The general doctrine is elsewhere stated[2] to be that the power to remove from office is in its nature an executive function and may be vested in the governor or in the local authorities of municipalities and counties, in mayors, common councils, boards of su-

[1] People *v.* Stuart, 16 Am. St. Rep., 644; 74 Mich., 411 (1899).

[2] See page 29.

pervisors or the like. If the law vesting the authority either in the governor or the local body indicates that such authority shall be exercised for cause only, then the proceeding is judicial in its nature, and the cause must be ascertained in such a proper proceeding as the nature of the case requires. If the action taken has been arbitrary and no remedy by appeal is given, some of the cases hold that the party injured is entitled to a writ of *certiorari* under the same circumstances and for the same causes as in other judicial or *quasi* judicial proceedings, not for the purpose of rejudging the merits of the cause but for the purpose of vindicating the right of the party to such a hearing and trial as under the circumstances are due process of law. The question of right is thus complicated with questions of remedy or procedure, and may arise and be determined in *mandamus, quo warranto, certiorari,* or in a suit for salary according to the circumstances of the case and subject to statutory or other rules governing the administration of these remedies in the local jurisdiction.

By the constitution of Michigan of 1850 the only provision for the removal of state officers was impeachment. By the governor's message of 1861 it was made known that the state treasurer was a defaulter. The defalcation was known to the governor long before the assembling of the legislature but he was powerless to remove the incumbent since the removal could be effected only by a call for an extra session of the legislature for the purpose of impeachment, as his term of office would expire before the regular meeting of the legislature. To furnish a

remedy for such a condition of affairs an amendment to the Constitution was proposed and adopted in 1862 which gave the governor extensive powers of supervision and removal.[1]

Question arose upon a *quo warranto* against an incumbent of office as to whom an order of removal had been made by the governor but who refused to surrender his office on the ground that the order had been made without notice, charge, or hearing. And it was held that the order of removal was invalid for that reason. It was argued, and cases were cited to show that the action of the executive was binding upon the courts, but they were held to be contrary to the weight of authority and to fundamental principles of justice. "That removals for cause are judicial acts and that they must be disregarded whether appealable or not, if not conforming to jurisdictional requirements, has been settled so long, not only in this state, but by the common-law doctrines and the general agreement of courts, that there is no room for controversy." General conclusions, or conclusions on general charges in such cases, are not enough; the facts must have been presented either in specific charges or in specific findings, and must appear as having been sustained by formal proofs, of the sufficiency of which, however, the original determination is conclusive. Justice Cooley concurred in the judgment as to the right of the respondent to be heard, and as to the power of the governor under the constitution to decide upon the charges.[2]

[1] Quoted in full in Chapter III, *supra*, p. 42.

[2] Dullam *v.* Willson, 53 Mich., 392; 51 Am. Rep., 128 (1884).

In 1893 four proposed amendments to the Constitution were voted upon in Michigan, one of which provided for an increase of the salaries of the state officers, including the secretary of state and the commissioner of the state land office. The latter officers, with the state treasurer, constituted a board of canvassers of the state election returns. Without personal examination of the returns or other verification the officers of the board signed a certificate of the canvass, made up by the clerks in the secretary's office, purporting to show that the salary amendment, among others, had received a majority of the votes cast, but in fact this certificate was erroneous, and the returns showed that the salary amendment had been voted down. The governor, acting under the provision of the Constitution above referred to, made an order setting forth specifically the alleged neglect and misconduct of the three officers, and, after hearing, ordered their removal from office. This the officers resisted on various grounds, among others that the canvassers were a separate tribunal created by the constitution and not subject to the authority of the governor, or any other, except the legislature by impeachment, and that the governor's action was not due process of law. It was held that the proceedings for removal, authorized by the constitution and conducted as they were by the governor, were due process of law, that a proceeding to remove an officer is not such as requires the action of courts or judicial proceedings in order to its validity, that the officers removed were within the constitutional provision, and

that it was no objection that the proceedings were instituted upon charges made by the governor himself, for he was given inquisitorial power, and it was within the line of his duty to take them. "It is the duty of the governor to investigate, using all lawful means to go to the bottom of any real or supposed irregularity. To that end he may use clerks or expert accountants, if necessary, and it is fair to presume that the state would recognize the expenses as legitimate obligations. The law does not require a complainant nor prevent the governor from committing the interests of the state to competent lawyers, official or otherwise. Finally the governor acts judicially upon the accumulated evidence and such explanations by way of defense as the respondents may offer." And it was held that it was a gross neglect by the officers justifying their removal, for them to make a certificate of the canvass without using any personal means to ascertain the correctness. "While there is a disposition upon the part of the average American to accept good intentions as an excuse for mistakes, it is not for the general public good that responsible public offices should be confided to or remain in the control of those whose duties and responsibilities rest so lightly upon them as to permit the public interests to be injured or endangered through neglect, and when such neglect, from the gravity of the case or the frequency of the instances, becomes so serious in its character as to endanger the public welfare, it is gross, within the meaning of the law, and justifies the interference of the executive

upon whom is placed by this amendment the responsibility of keeping the offices of state in a proper condition.''[1]

Where an officer was appointed to succeed before the end of the term another officer who was commissioned for three years, and on the expiration of the three years a third was appointed, a ''removal'' of the second mentioned officer will not be inferred from the mere appointment of the last, where the circumstances indicate that the last appointment was made upon the supposition that the second was made to fill the vacancy for the unexpired term, no charge having been preferred nor hearing had, nor notice of removal given. And in that state of the case where, upon a true construction of the law, it appears that the first officer's appointment was for a full term of three years, the action taken as stated is not effectual for his ''removal,'' for where an officer holds for a specified term of years ''if he shall so long behave himself well,'' there is no implied conviction of misbehavior, nor any implied removal for that cause, arising from the appointment of another person to fill the same office.''[2]

[1] Attorney-general *v.* Jochim, 99 Mich., 358; 41 Am. St. Rep., 606 (1894).

[2] Commonwealth *v.* Slifer, 25 P. S. R., 23; 64 Am. Dec., 680 (1855).

CHAPTER IX

THE EXECUTION OF THE LAWS

The general power or rather the "administrative" function as distinguished from the "political,"[1] is expressed in the constitutional provision which imposes the duty "to take care that the laws be faithfully executed." When a duty is imposed by law the necessary and proper authority to discharge the duty is implied, but the power may lack legal completeness and effect from a want of provision of the necessary means or legal methods of procedure. These, when they exist, may be found in the constitution itself or in the statutes, or in the principles and methods of common law. The general provision is further supported by the provision conferring and imposing specific powers and duties relating to the political and legal functions of the executive; the whole embracing a wide discretion, and calling for the exercise of those qualities of diligence, prudence, discreetness and wise statesmanship, which should belong to exalted place. The executive authority receives a comprehensive demonstration in its general relations to the legislature, in the execution of the

[1] A distinction which is presented by Professor Goodnow in his admirable work, "Comparative Administrative Law," pp. 49–51, 71.

Constitution through the use of the veto power, in the exercise of the power of pardon, in the selection, supervision, and removal of public officers and in the discharge of manifold statutory duties incident to the conduct of the affairs of state; but the execution of laws embraces more than what is written in the constitution and statutes, and includes an important class of subjects, within the domain of the common law.

To the executive is confided the care of the interests of the state as a body politic in various civil relations, such as an owner of property, real and personal, as a contracting party, as a creditor, as a litigant, as a party entitled to certain preferences or to the enjoyment of certain immunities, and as one injured, in its sovereign capacity, not merely as by public offences or crimes, but by wrongs done to its property, or by frauds practised upon it in various ways, such as by the wrongful procurement of grants of public lands, or of corporate franchises. Other matters, pertaining neither to the general criminal law on the one hand nor to the mere private rights of the state on the other, but of the nature of public rights or interests of the state or affairs involving the general welfare, as for example the public highways and waters of the state, its forests, game and fisheries, and its public franchises, are entrusted to the care of the executive, to the end of checking usurpation or correcting abuses. All, or most, of the foregoing powers, depend in general upon the common law for their explanation and for the definition of the executive authority to be exercised and the mode of its action.

The executive power over the money of the state is limited by the general constitutional provision that "no money shall be drawn from the treasury except in pursuance of appropriations made by law." No executive officer of the state has the power to incur a state debt by overdrawing the bank account of the state, or in any other way, without authority of law; nor does the authority exist to pay a claim against the state, however just, in the absence of an appropriation for its payment. Contracts may be authorized to be made by executive officers, on the faith of the state, and the legislature may authorize the incurring of indebtedness in the current and usual administration of state affairs. A constitutional provision is common that the legislature may not appropriate money to pay any claim founded upon any agreement or contract made without express authority of law. Officers cannot bind the state without authority of law, and the liability of the state must be a contractual liability; it can arise neither from estoppel, nor from wrongs done by officials. And the authority to contract must be real and express. It cannot be based upon the apparent scope of official duty: for example, the governor's employment of an agent to collect a claim of the state, or of an attorney to assist legislators, or to revise the laws, or of an expert to investigate the state penitentiary, or his purchase of military supplies, or his sale of bonds at less than par or on credit, cannot be sustained upon his general power as executive, but must be expressly authorized by law. But where powers are expressly conferred they carry the necessary implications. A conditional authority

must be strictly pursued; thus when the governor has power to contract for state supplies upon certain contingencies, his contract is not valid in the absence of the conditions prescribed by law.

Where there is a perfect contract the state is bound to perform it according to its legal tenor and effect. In entering into a contract the state lays aside its attributes as a sovereign and binds itself substantially as the citizen does when he enters into a contract. Its contracts are interpreted as the contracts of individuals are, and the same law which measures individual rights and responsibilities measures those of the state when it enters into an ordinary business contract. The principle that the state so binds itself, carries with it the inseparable rule that abrogates the power to annul or impair its own contract. It may have the might and means of defeating the enforcement of a contract, yet in a just sense it has no true power to do so, for the right is absent. Legislatures may by a failure to make an appropriation defeat a just claim, or indeed block the wheels of government, but under the constitution they have no rightful authority so to do. They have no constitutional power to annul or impair a valid contract entered into by the state. But the state cannot be sued without its consent, and as its executive officers have no authority to pay its debts in the absence of an appropriation by the legislature, the state may practically defeat the payment of its obligations. If, however, there is an effective appropriation, then the officer whose duty it is to draw a warrant upon the fund set apart by statute, may be coerced by judicial

process into the performance of that duty. But there is no such power to coerce the legislature into making an appropriation, nor can the courts effect such result by indirection, and hence it is that no action will lie for such a purpose in the absence of an appropriation. The judicial department cannot thus encroach upon the legislative. The question of the enforcement of a contract therefore frequently depends upon the effect of constitutional and statutory provisions relating to appropriations. There must be an intention to assign and set apart funds in the treasury, for the purpose of their application, and the question is frequently one of statutory interpretation. It is sufficient if the intention to make the appropriation is evinced by the language of the statute, or that no effect can be given to the statute unless it is considered as making an appropriation. Thus, if the salary of a public officer is fixed and the times of payment prescribed by law, no special appropriation is necessary to authorize the issuing of a warrant for its payment. A statute attempting to withdraw an appropriation by annulling a contract cannot accomplish such a purpose because the legislature has no power to annul contracts, but the same result can be effected by repealing the appropriation.[1] As to what forms of legislative expression amount to an appropriation is a question to be solved in the particular case, a topic upon which there are many decisions.[2]

A state may sue in her own courts or in the courts

[1] Louisiana *v.* Jumel, 107 U. S., 711 (1882).

[2] Carr *v.* State, 127 Ind., 204; 22 Am. St. Rep., 624 (1891), and note.

of another state. The judicial power of the United States extends to controversies between two or more states; and between a state and the citizens thereof, and foreign states, citizens or subjects; but not to a suit against one of the United States brought by citizens of another state, or by citizens or subjects of any foreign state. The Supreme Court has original jurisdiction of cases in which a state is a party. Process from the Supreme Court against a state is served upon the governor and attorney-general of such state. In the case of Madroso *v.* the Governor[1] of Georgia it was decided that where the governor of a state is sued, not by his name as individual but by his style of office, and the claim made upon him is entirely in his official character, the state itself may be considered as a party to the record. And the practice has been frequent of suing in the name of the governor in behalf of the state. It was indeed the form originally used.[2] Where a statute directs bonds for the public benefit to be payable to the governor or other public functionary having legal succession, the office is the payee, and the successor whether described *eo nomine* in the statute or bond or not, may sue on the bond: *e. g.* a bond payable to Newton Cannon, governor of the state of Tennessee and his successors in office, was rightly sued on in the name of James K. Polk, Governor of the State of Tennessee. Where the state treasurer endorsed a draft payable to him as such to a party who received it in payment of the treasurer's individual debt, such endorsee was held liable in *as-*

[1] 1 Peters, 110 (1828).

[2] Kentucky *v.* Dennison, 24 How., 66 (1860).

sumpsit to the state. It was not necessary that a legislative act should waive the tort in order to found the action.[1] Independent of statutory provision, the state as a political corporation, has a right to institute a suit in any of her courts whether it be required by her pecuniary interests or the general public welfare demand it. In a suit for an injunction brought by the State of Illinois to restrain the closing of a navigable channel of the Mississippi River between an island and the mainland by works intended to improve the navigation of the main channel, the court said: "We could not doubt, judging from the facts agreed on, that the best interests of the public as a whole would be thereby subserved. But the discretion involved is vested in another branch of the government. We are not at liberty to look at these general results in determining whether these works would amount to a nuisance. The executive or attorney-general may very properly have considered it an imperative duty to protect the rights of the state against encroachment, leaving it to the legislature, where the question properly belongs, to say whether permission should be given to proceed with these works."[2]

The executive power in the execution of the laws by civil or criminal proceedings in the courts of justice is exercised immediately through the agency of the attorney-general and the district or prosecuting attorneys or solicitors. These proceedings are in

[1] Wolff *v.* State, 79 Ala., 201; 58 Am. Rep., 59 (1885).

[2] People *v.* City of St. Louis, 5 Gilm. (Ill.), 351; 48 Am. Dec., 339 (1848).

general by prosecution by indictment for criminal offences, by *mandamus* to compel the performance of official or other public duty, by *quo warranto* to try the right to exercise a public office or franchise, and by information or bill in equity to vindicate the rights of the state or of the general public in their various forms. The officers mentioned were formerly under the direction of the chief executive magistrate and in theory are so still; but election by the people, and independent tenure of office, the imposition of statutory duties and the vesting of an independent official discretion, have had a tendency to remove these officers from immediate executive control. Nor in practice is such control often found to be necessary.

Chief Justice Wilmot, in the case of Wilkes, gave an account of the king's sergeant and king's attorney-general at the common law. These offices are of immemorial origin, and it seems that originally the king had his attorney or sergeant in every county to prosecute the pleas of the crown. The name of attorney-general means no more, he tells us, than that the person is generally employed to sue for and defend the king, either by general or special directions, as in the ordinary relation of attorney and client. "The attorney-general is entrusted by the king and not by the Constitution—it is the king who is entrusted by the Constitution. The great abilities of the persons appointed to the office have made it to figure high in the imagination and affixed ideas to it which do not belong to it; for he is but an attorney, though to the king, and in no other or different relation to him than to any

other employer, and it is by degrees that he hath attained to that rank which he now holds in the law." Most of the colonies appointed attorneys-general and they were understood to be clothed with nearly all the powers of the attorney-general of England, and as the powers of these officers have not usually been defined, they are interpreted in the states and under the federal government by the common law. The Texas constitution of 1876 provides that the attorney-general shall represent the state in all suits in the Supreme Court of the state, in which the state shall be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time take action in the courts, as may be proper and necessary to prevent any private corporation from exercising any power, or demanding or collecting any excess of taxes, tolls, freight or wharfage, not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters unless otherwise expressly directed by law, and give legal advice to the governor and other executive officers when requested by them, and perform such other duties as may be required by law. This provision is merely an incomplete description of the general powers and duties of the attorney-general at common law. In Massachusetts, it is held that his authority extends to equitable suits in cases of trusts for charitable purposes, where the beneficiaries are so numerous that the breach of trust cannot be effectively redressed except by suit on behalf of the public. And the rule is general that he properly represents the public as a party plaintiff or defendant in cases of public trusts or charities.

At common law the attorney-general alone had the power to enter a *nolle prosequi*, and might, under such precautions as he felt it his duty to adopt, discontinue a criminal proceeding at any time before verdict. It probably exists in the attorney-general at this day, but has by statute been delegated to the district attorneys, who now represent the attorney-general in nearly everything pertaining to indictments and other criminal proceedings local to their respective counties,—sometimes with the statutory requirement of leave of court, but courts have no power to direct it; that power belongs to the executive branch of the government.[1]

There are many injuries, public in their nature, which affect many individuals, but which, under well recognized principles of law, are not deemed to be such as inflict special loss or damage upon particular individuals. In such and other instances, it frequently happens that individuals, more or less in number, present their grievances to and invoke action by the attorney-general for their protection, and the protection of others in similar condition. The attorney-general in such cases enters upon a more or less formal hearing of the parties to the controversy and uses a sound discretion in the institution of proceedings in the name of the state, for redress, and in permitting the conduct by private counsel for the complainants under his supervision. And in some instances statutory provisions make it his duty to institute proceedings upon complaint of citizens in

[1] People *v.* McLeod, 1 Hill (N. Y.), 377; 37 Am. Dec., 337 (1841).

certain cases. Such provisions indicate an increasing tendency to correct the evils which attend a divided and irresponsible executive authority, by substituting the express direction of the law for that active and prompt direction incident to the responsibility of a single and controlling executive head.

CHAPTER X

THE USE OF FORCE BY THE EXECUTIVE

As the law officers of the state represent the executive power in the execution of the laws through the procedure of the courts, so the sheriffs of the counties represent the same power in the execution of judicial process and in the preservation of the public peace. The state constitutions sometimes provide that the governor shall be conservator of the public peace throughout the state, but such a provision probably adds nothing to the general provision, common to all the constitutions, that he shall take care that the laws be faithfully executed; for the end is the same, and when the laws are executed peace is preserved. Theoretically the relation of the governor to the sheriff is similar to his relation to the law officers of the state.[1] In practice the authority of the governor is usually invoked by the sheriff when local resistance to the law becomes too powerful to be overcome by the means at his disposal. The assistance of the power of the state is usually given in the form of military force. Recent legislation in some states has added a state constabulary[2] to the force at the disposal of the gov-

[1] See Chapter IX, *supra*.

[2] "By far the most conspicuous evidence of centralization is found in the creation of the state police of Pennsylvania.

ernor in the preservation of the peace and the support of the local authority.

The sheriff is the chief executive officer of the county, which is usually the limit of his jurisdiction. He is the conservator of the peace within his county and may arrest on view all persons breaking or attempting to break it; and it is his duty to pursue and arrest all criminals. He may call bystanders to his assistance, or summon the power of the county (*posse comitatus*) to assist him in the performance of his duties, including citizens, armed, organized and in military array, acting under their proper officers by his direction; and it is the duty of the private citizen to respond to his summons, sometimes under penalty of indictment if he does not; and those who thus join and co-operate with the sheriff, using good sense according to the necessity of the case, are armed for the occasion with the powers, and protected by the immunities, of the regular officers of the law.

"It seems that anciently the government of the county was by the king lodged in the earl or count, who was the immediate officer of the crown, and this

The force is to consist of four companies of 57 men each, under the general charge of the superintendent of state police, an officer appointed by the governor for a term of four years." Their duties are to co-operate with the local authorities and they have all the powers of a member of the police force or a constable. They also act as food, fire, game and fish wardens. "This step is a highly significant one as it is a move in the development of administrative machinery for the enforcement of state law." Merriam, Yearbook of Legislation, 1905. Massachusetts and Connecticut also have a regular state constabulary for general purposes.

high office was granted by the king at will, sometimes for life and afterwards in fee. But when it became too burdensome and could not be commodiously executed by a person of so high rank and quality, it was thought necessary to constitute a person qualified to officiate in his room and stead, who from hence was called, in Latin, *Vicecomes,* and Sheriff, from Shire reeve, *i. e.* governor of his Shire, or county, of which he hath the care, and in which he is to execute the king's writs, and which is called his bailiwick. He is therefore at this day considered an officer of great antiquity, trust and authority, having, as Mr. Dalton observes, from the king, the custody, keeping, command and government (in some sort) of the whole county committed to his charge and care; and according to my Lord Coke he is said to have *triplicem custodiam,* viz: *vitæ justiciæ, vitæ legis, et vitæ reipublicæ,* etc.; *vitæ justiciæ,* to serve process and return indifferent juries for the trial of men's lives, liberties, lands and goods; *vitæ legis,* to execute process and make execution, which is the life of the law, and *vitæ reipublicæ,* to keep the peace."[1] The executive power, in the use of civil force for the execution of the laws, is interpreted by the principles of the common law.

The usual provision of the state constitutions as to the military power of the governor is that he shall be the commander-in-chief of the army and navy of the state, and of the militia, except when they shall be called into the actual service of the United States.

[1] Bacon's abridgment, Title, Sheriff.

The corresponding provision of the Federal Constitution is that the President shall be the commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States. A provision that the governor should not command in person unless advised to do so by the council or the General Assembly, was common in the older constitutions. The provision that he shall have power to call forth the militia "to execute the laws, suppress insurrections, and repel invasions," is general. Texas,[1] 1876, adds: "and protect the frontier from invasions by Indians or other predatory bands." Arkansas, 1874, provides: that the governor, when the General Assembly is not in session, shall have power to call out volunteers or militia to execute the laws and preserve the public peace in such a manner as may be authorized by law; and Tennessee, 1870, that the militia shall not be called into service except in cases of rebellion or invasion, and then only when the General Assembly shall declare by law that the public safety requires it. The New York constitution of 1846 provided that the governor should continue commander-in-chief when out of the state, by the consent of the legislature, at the head of a military force of the state; and California, 1849, added, "in time of war." Other states have made similar provision. Alabama, 1819, gives the General Assembly authority to fix the rank of the

[1] This state has a force of "Rangers" in the service of the state for the protection of the frontier and the suppression of lawlessness. Arizona and N. Mexico make like provisions.

governor when acting in the service of the United States. The constitution of Massachusetts, 1780, makes very explicit provision, as follows: The governor of this commonwealth, for the time being, shall be the commander-in-chief of the army and navy, and of all the military forces of the state, by sea and land; and shall have full power by himself, or by any commander, or other officer or officers, from time to time, to train, instruct, exercise and govern the militia and navy, and for the special defense and safety of the commonwealth, to assemble in martial array, and put in warlike posture, the inhabitants thereof, and to lead and conduct them, and with them to encounter, resist, repel, expel, and pursue by force of arms, as well by sea as by land, within or without the limits of this commonwealth, and also to kill, slay, and destroy, if necessary, and conquer by all fitting ways, enterprises and means whatsoever, all and every such person or persons as shall, at any time hereafter, in a hostile manner, attempt or enterprise the destruction, invasion, detriment or annoyance of this commonwealth; and to use and exercise over the army and navy, and over the militia in actual service, the law martial, in time of war or invasion, and also in time of rebellion, declared by the legislature to exist, as occasion shall necessarily require; and to take and surprise, by all ways and means, whatsoever, all and every such person or persons, with their ships, arms, ammunition and other goods, as shall in a hostile manner, invade or attempt the invading, conquering, or annoying this commonwealth: and the governor shall be entrusted with all

these and other powers incident to the offices of captain-general and commander-in-chief and admiral, to be exercised agreeably to the rules and regulations of the Constitution and the laws of the land, and not otherwise: provided, that the governor shall not, at any time hereafter, by virtue of any power of this Constitution granted or hereafter to be granted to him by the legislature, transport any of the inhabitants of this commonwealth, or oblige them to march out of the limits of the same without their free and voluntary consent, or the consent of the general court; except so far as may be necessary to march or transport them by land or water for the defense of such part of the state to which they cannot conveniently have access.

Much of the phraseology of the above provision is similar to that contained in the charter of 1609 granted by King James I. to Virginia; to that of the charter of New England of 1620; to that of the charter of King Charles I. of 1629, granted to Massachusetts Bay; and to that of William and Mary, 1691, granted to the same. Similar phraseology is found in other charters to other colonies. The provisions of the Massachusetts constitution of 1780 are closely followed by those of the New Hampshire constitution of 1792; what is new in these constitutional provisions is principally by way of limitation, and they may otherwise be regarded as descriptive of the general military powers as exercised by the colonial governors for more than a century and a half, and of those intended to be conferred by the later state constitutions in the briefer provisions which constitute the

governor commander-in-chief and authorize him to employ military forces to execute the laws, suppress insurrections and repel invasions.

The military powers of the executive over the land forces, including troops and others subject to military discipline, are interpreted by the law military as found in the constitution, statutes, authorized regulations, and the unwritten customs of the service as understood and practised by military men; over the naval forces by the like written laws and the customs of the sea. When in consequence of local tumult, insurrection or rebellion the civil administration of the law is resisted or displaced, the civil population of the district involved is governed by the military authority and such measures as are necessary for the public security and the safety of the troops are enforced as martial law; when the territory of the enemy is possessed and occupied the civil population is governed by the similar law of military occupation; and the executive power, when exercised by the military arm, against belligerents, either rebel or alien enemies, is interpreted by that part of the law of nations known as the laws of war.

The constitutional commander-in-chief is a civil magistrate and his command of the military forces subordinates the military to the civil power. This civil authority over the military, exercised according to law, whether by the mayor of a city, the sheriff of a county, or the governor of a state, is governed by similar principles, some of which are illustrated and explained in a case decided in the Supreme Court of Massachusetts substantially as follows: In 1854 An-

thony Burns was arrested in Boston as a fugitive from service and held under federal authority pending his extradition. A riot was threatened and the mayor of Boston called out a force of militia and gave instructions to the commanding officer so to dispose of his troops as to aid the police on receiving notice of the hour at which the marshal would move his *posse*. A person injured by the soldiers in attempting to force his way along one of the guarded streets brought suit against the mayor, commanding officer and others. The statutes of Massachusetts included mayors of cities within the list of civil officers by whom an armed force might be called out in aid of the civil authorities in case a tumult, riot, or mob should be threatened and the fact should be made to appear to him. In examining the authority thus conferred, the statute makes it the duty of the mayor or other magistrate first to determine whether the occasion for calling out the military force exists. This depends upon a question of fact which it is his exclusive duty to determine and which is within the general principle that whenever the law vests in an officer or magistrate a right of judgment, and gives him a discretion to determine the facts on which the judgment is to be based, he necessarily exercises within his jurisdiction a final authority,[1] and is exempted from

[1] This power is held by some to be judicial or quasi-judicial, but if so, the executive officer, while possessing all the immunities of judicial tribunals, is subject to none of the limitations of those tribunals, but exercises his judicial functions without notice or hearing and subject to no appeal. See Ela *v.* Smith, 5 Gray (Mass.), 121.

all liability for his judgments, or acts done in pursuance of them, if he do not exceed his authority. The grounds of the judgments of such officers cannot be inquired into, nor can they be held responsible therefor in a civil action. This protection and immunity are essential in order that the administration of justice and the discharge of important public duties, may be impartial, independent, and uninfluenced by fear of consequences. The judgment of the mayor being thus conclusive, having been rightly exercised within the authority conferred by law, no liability was incurred by him in issuing the precept by which the armed force was called out, and being a warrant in conformity with the statute and regular upon its face, issued by a magistrate of competent authority, and within the scope of his jurisdiction, it affords a complete protection and justification to all who are bound to obey its commands for all acts lawfully done by them in pursuance thereof.

The right to call out the troops for a particular purpose carries with it by necessary and reasonable implication, the right to employ them to effect that object and to issue all proper orders and use all reasonable means therefor. It would be absurd to say that a body of troops might be assembled to carry out a specified object, but that when they appeared in pursuance of summons no one could give an order to accomplish the purpose for which they were assembled. And the authority given by the statute is in cases of actual tumult or riot vested in the civil magistrates and officers by the well-settled principles of the common law. It cannot be urged as a valid

argument that this authority is liable to abuse and may be made the instrument of oppression. Its existence is essential in a community where the first and most important use of law is in preserving and protecting persons and property from unlawful violence.

The statute does not enlarge the power of the civil officers by giving them any military authority, but only places at their disposal a body of men more efficient than the ordinary police force; nor can the magistrate delegate his authority to the military force which he summons. The military authorities must perform only such service and render such aid as is required by the civil officers. This is not only essential to guard against the use of excessive force and the exercise of an irresponsible power, but is required by the constitutional principle which subordinates the military power to the civil authority. It does not follow from this, however, that the military force is to be taken wholly out of the control of the proper officers. They are to direct its movements in the execution of the orders given by the civil officers, and manage the details in which a specific service or duty is to be performed, after the same has been prescribed and designated by the civil authority. An order clothing the military "with full discretionary powers to sustain the laws of the land" is too general. It must be supported by more specific directions.

The motive actuating the rioters in their tumult is entirely immaterial. An allegation that they were merely resisting the enforcement of an unconstitutional law cannot be entertained, nor does such allega-

tion properly present any question as to the validity of the law to the execution of which the tumult is opposed. It is equally the duty of the civil officers to take all proper steps to prevent a threatened riot, or mob, whether it is likely to arise from the enforcement of a constitutional or an unconstitutional law. Under the constitution a right is secured to every person to find a remedy by having recourse to the laws for all injuries or wrongs which he may receive in his person, property or character, and a resort to unlawful violence cannot be necessary or justifiable. Nor can the officers, civil or military, be held liable for the unlawful acts of others done without their authority, and not coming within the fair scope of the orders given by them. They cannot be held liable for any unauthorized violence not perpetrated in their presence.[1]

It thus appears that the executive judgment as to whether an occasion has arisen calling for the exercise of military power is conclusive; that orders appearing upon their face to be given pursuant thereto, are a protection to subordinates; that the active employment of the troops must be deemed to have been intended by law; that the military officers conduct the operations under the direction of the civil power; and that the motives giving rise to the tumult are immaterial and afford no legal justification of violence.

A recent case in Pennsylvania[2] carries the sub-

[1] Ela *v.* Smith, 5 Gray (Mass.), 121; 66 Am. Dec., 356 (1855).

[2] Commonwealth *v.* Shortall, 206 P. S. R., 165 (1903).

ject forward another stage, explains the authority of the military in action and incidentally shows how martial law may prevail though the courts are open. The case was that of *habeas corpus* for a soldier charged with murder, and the question was whether the killing was justified by the military orders given. A strike of coal miners involving several counties in the state and successful resistance of local authority, had given rise to action by the governor and the movement of a military force into the coal region under orders to protect workmen and property, to arrest all persons engaging in violence or intimidation, to hold them under guard until their release would not endanger the public peace, to preserve the public peace and order and to permit no interference with officers and men in the discharge of their duties. A guard having been placed for the protection of a house which had been injured by dynamite, under instructions to protect it and to shoot any suspicious character who might approach and fail to halt when ordered to do so, a homicide resulted pursuant to the order. A coroner's jury found the shooting to have been unjustifiable and held the soldier to answer a charge of murder, but the court discharged him. It was held that the executive order under which the troops were sent to the coal region was a declaration of qualified martial law; "qualified in that it was put in force only as to the preservation of the public peace and order and not for the ascertainment and vindication of private rights or other functions of government." For these the courts and other agencies of the law were still open, and no exigency re-

quired interference with their functions. But within its necessary field and for the accomplishment of its intended purpose, it was martial law with all its powers. The government has, and must have, this power or perish. And it must be real power, sufficient and effective for its ends: the enforcement of law, the peace and security of the community, as to life and property. It is not unfrequently said that the community must be in a state either of peace or of war, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all the ordinary purposes of life, and yet a state of disorder, violence and danger in special directions which, though not technically war, has in its limited field the same effect, is of importance enough to call for martial law for its suppression, and is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war. The condition in fact exists, and the law must recognize it, no matter how opinions may differ as to what it should be most correctly called. When the civil authority, though in existence and operation for some purposes, is yet unable to preserve the public order, and resorts to military aid, this necessarily means the supremacy of actual force, the demonstration of the strong hand usually held in reserve, and operating only by its moral influence, but now brought into active exercise, just as the ordinary criminal tendency in the community is held in check by the knowledge and fear of the law, but the overt lawbreakers must be taken into actual custody. When the mayor or bur-

gess of a municipality finds himself unable to preserve the public order and security and calls upon the sheriff with the *posse comitatus*, the latter becomes the responsible officer and therefore the higher authority. So if in turn the sheriff finds his power inadequate, he calls upon the large power of the state to aid with the military. The sheriff may retain the command, for he is the highest executive of the county and if he does so, ordinarily the military must act in subordination to him. But if the situation goes beyond county control and requires the full power of the state, the governor intervenes as the supreme executive and he or his military executive becomes the superior commanding officer. So, too, if the sheriff relinquishes the command to the military, the latter has all the sheriff's authority added to his own powers as to military methods. The resort to the military arm of the government therefore means that the ordinary civil officers to preserve order are subordinated and that the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander. To call out the military and then have them stand quiet and helpless while mob law overrides the civil authorities, would be to make government contemptible and destroy the purpose of its existence. The effect of martial law therefore is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and the security of life and property are concerned there is no limit but the necessities and exigencies of the situation. And in this respect there

is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defence, common to all countries, has established the rule that whatever force is necessary is also lawful.[1]

[1] Per Chief Justice Mitchell. For a very full discussion, see opinions and dissenting opinion. *Re* Moyer, 12 L. R. A., N. S., 979.

CHAPTER XI

RELATIONS OF THE EXECUTIVES OF THE STATES WITH ONE ANOTHER

THE description of the functions of the American executive is in a sense the description of the powers of the American state. The executive is the government in action, after deliberation and decision. The state acts by its constituted agencies; these agencies are collectively termed its government; so far as these agencies are executive they are frequently termed its "administration"; and so long as the executive agencies operate within the constitutional sphere a description of their powers and the methods of their exercise is a description of the activities of the state; when the authority is exceeded, either from want of constitutional capacity in the state to confer it, or because the authority conferred has been transcended or abused, another class of questions is presented. The purpose of this chapter is to indicate the residue of functions remaining in the state, under the Federal Constitution, so far as such functions belong to the executive department and have reference to the relations of the state with other states of the Union.

Some of the federal limitations upon the powers of the states are the following: No state shall enter into any treaty, alliance or confederation; grant let-

ters of marque or reprisal; coin money; emit bills of credit; make anything but gold and silver coin a legal tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility. No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necesary for executing its inspection laws. No state shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. Other functions are surrendered to the Federal Government or exercised concurrently: such as those relating to commerce, bankruptcy, naturalization, inventions, copyright.

A glance at this apportionment of the functions of sovereignty, above referred to, will serve to show to what extent they are to be classed as executive or legislative powers.

Whatever may have been the theoretical completeness of the sovereignty of the several states at the moment of the Declaration of Independence, it remains true that their complete sovereignty never in fact existed. The Declaration itself is equivocal. It is the declaration of the thirteen united states of America, as the voice of one people dissolving the political bands which have connected them with another; it declares them to be free and independent states, with all the powers of such, whereas it found

them united in a common war, under a provisional and revolutionary government, which assumed and exercised powers depending upon no formal grant; and the ensuing peace found them united under Articles of Confederation which were to be replaced by the Constitution.[1] "The union of the states was

[1] The first notable act of aggressive war was the capture of Ticonderoga, the surrender of which was demanded by Ethan Allen, May 10, 1775, "in the name of the Great Jehovah and the Continental Congress." He had no authority from the latter, at least, though Congress assembled on that day and afterward with some hesitation adopted his act. Prior to the Declaration of Independence and between May 10, 1775, and June 1, 1776, the Continental Congress had assumed control of the army, adopted a code of rules for its government and appointed a commander-in-chief and other officers; had authorized privateers and provided for prize courts; had approved and advised aggressive war; had borrowed money, issued bills of credit; and appointed two persons as joint treasurers of the united colonies; had established postal communications from New Hampshire to Georgia and appointed a postmaster-general; had taken control of Indian affairs, provided for disarming Tories, opened colonial ports to the commerce of the world, provided for diplomatic intercourse and established informal diplomatic relations with France. The flag of the historic stripes was unfurled by Washington as the flag of the united colonies, January 2, 1776. The Union is, therefore, not only older than the Constitution, as President Lincoln said, but older than independence itself. The legal organ of the Union was the continental Congress. "The powers of [this] Congress were revolutionary in their nature, arising out of events adequate to every national emergency, and co-extensive with the object to be attained. Congress was the general supreme, and controlling council of the Nation,— the center of the Union, the center of force, the sun of the political system. To determine what their powers were we must inquire what powers

never a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations.''[1] The Federal Government was invested with many of those imperial powers which formerly belonged to the Parliament or Crown. The legal condition of the states in the Union was in many respects similar to that of the colonies as members of the Empire. They were without the powers of external diplomacy, of peace and war; their external commerce was regulated; their legislative power was limited. Thus the instructions given to Governor Bernard, a royal governor of New Jersey, in 1758, required that acts affecting trade or shipping be submitted for approval before taking effect; that no acts diminishing the royal revenue should be passed without special leave; acts for the issue of bills of credit required special leave before taking effect; gifts to the governor were prohibited; the act of Anne for ascertaining the value of foreign coins was to be strictly enforced; duties upon the importation of felons or negroes were prohibited; not more than one office could be executed by any person by deputy; liberty of conscience was to be permitted; articles of war or other law martial was not to be put into execution without leave from home

they exercised." Penhallow *v.* Doane, 3 Dallas, 54, 1795. The Articles of Confederation were a failure because they did not interpret the necessary facts of the Union as it existed; the Constitution succeeded because it did rightly interpret them.

[1] Texas *v.* White, 7 Wall, 725 (1868).

and a mutiny act was directed to be prepared. The Federal Constitution is an assemblage and arrangement of what were at the time well-known elements; as an instrument in writing it is a collocation of long familiar phrases. The wisdom and genius of its framers were displayed in the practical adaptation and articulation of parts to the harmonious working of a new theory of government. And one result of their work is that for many purposes the executive of an American commonwealth occupies substantially the same place and exercises substantially the same executive powers as the colonial governor.

It would not be profitable to compare the interrelations of the state executives with the categories of diplomatic relations found in international law, although these relations are similar, so far as they exist, to the relations of foreign states with each other, and are governed by similar principles. The subject may be considered, as it has been partially explained, by judicial and other precedents. In view of modern tendencies it promises to be one of increasing interest.

The conduct of these relations is in its nature an executive function, but it is one to which express reference has rarely been made in the state constitutions. The constitution of South Carolina, 1776, provided that the President and commander-in-chief should have no power to make war or peace, or enter into any treaty, without the consent of the General Assembly and legislative council. Pennsylvania, 1776, provided that the President and council were to correspond with other states. By the New York con-

stitution of 1777, the governor had power to correspond with the Continental Congress and with other states; Vermont, 1786, to correspond with other states. The Virginia constitution of 1870 provides that the governor shall conduct in person or in such manner as shall be prescribed by law, all intercourse with other or foreign states; the Texas constitution of 1876, that the governor shall conduct in person, or in such manner as shall be prescribed by law, all intercourse and business of the state with other states or with the United States.

Interstate extradition of fugitives from justice is recognized by the Federal Constitution as one of the functions of the state executive. The international extradition of fugitives from justice rests upon comity or treaty. Continental jurists have argued for a complete obligation in the absence of treaty. English and American authority is the other way. Prior to the Revolution a criminal flying from one English colony to another found no protection, but was arrested by the authorities of the territory into which he fled, and delivered up for trial within the jurisdiction where the offence was committed, and this because the colonies formed but parts of the same empire under a common sovereign. But the practice rested in part on treaties between the several colonies, as for example, between the colonies of Massachusetts, New Plymouth and Connecticut. The Articles of Confederation provided for the surrender of fugitives from justice in terms almost identical with those of the Constitution, which are: "A person charged with treason, felony or other crime who shall

flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled be delivered up to be removed to the state having jurisdiction of the crime." And the great weight of authority is that this established an absolute right of demand for surrender when the case was within the terms of the Constitution, leaving no discretion in the executive upon whom demand is made, although no legal remedy is provided to compel the performance of the duty. And the word crime embraces every species of offence made punishable as a crime by the laws of the state making the demand, even though it were not a crime by the common law, or under the laws of the other states, and even though for the first time made a crime by a law passed subsequently to the adoption of the Constitution and the act of Congress regulating the execution of the provision.

Independently of all constitutional and legislative provisions, the surrender of fugitives from justice has, between nations, been treated as an executive power, lodged in the supreme executive authority of the state. It has been an international concern, and the executive is the organ of communication between one state and another. Under the treaty with Great Britain in the case of Robbins, the power of the President to surrender a fugitive from justice, whose extradition was claimed under a treaty, which is declared by the Constitution to have the force of law, was held by the concurring authority of the executive, the House of Representatives and the District Court of South Carolina, to be an executive power

and duty, in the absence of any legislative regulation.

The Act of Congress provides that the demand on the governor for the surrender of the fugitive shall be accompanied by a copy of the indictment found or affidavit charging the crime, certified by the governor of the state making the demand as authentic. The demand having been complied with by the issue of a warrant by the governor of the state on whom the demand is made, the warrant is a complete authority for the arrest and extradition of the fugitive. No other action is contemplated by or provided for in the Act of Congress. It may be assumed that in devolving this duty on the highest officer of the state, Congress understood it was making a suitable provision for securing a careful execution of the duty under circumstances calling for great caution and circumspection. The governors were aided in their positions by high legal officials, and in some of the states had the constitutional right to call upon the highest court of the state for its opinion on doubtful questions of law. They were especially charged with the execution of the laws of the state, and might be presumed to be jealous of any attempt to abuse the right of demand, as affecting their own citizens, or persons within the protection of their state. And neither the law nor the practice under it supports a contention that the warrant of arrest should be supported by the documents on which the governor acted in granting it or copies of the same. All the disadvantage that results from the conclusiveness of the warrant is that the alleged

fugitive is thereby removed to another state of the Union, where he has open to him still the privileges of *habeas corpus* and a trial according to the methods and under the securities of law, and he is not liable to unreasonable detention or inconvenience beyond that which is essential to a proper regard for the public safety and the orderly administration of public justice. The question of the identity of the person arrested is open to inquiry upon a writ of *habeas corpus,* directed to the bearer of the warrant, and some of the authorities are to the effect, contrary to the principles above stated, that the courts will inquire into the grounds upon which the warrant was issued.

Mandamus will not lie from either state or federal court, including the Supreme Court of the United States, at the suit of the demanding state, to compel compliance with the demand. And, the warrant having been granted, the governor granting it cannot be regarded as an inferior magistrate to whom a writ of *certiorari* may issue in aid of a writ of *habeas corpus.* A federal court has jurisdiction in such cases, and in such proceeding it is not necessary that notice should be given to the attorney-general of the state in which the prisoner is held. A warrant of arrest may be revoked by the governor and he may issue a second warrant if the fugitive escape. Contrary to the rule which obtains in international extradition, the fugitive may be tried for a different offence from that for which he was extradited.[1]

[1] See generally *In re* Leary, Fed. Cases 8,162, 10 Ben., 197 (1879); Kentucky *v.* Dennison, 24 How., 66 (1860)

The Articles of Confederation provided for a tribunal, to be constituted, in the nature of a tribunal of arbitration, whenever the legislative or executive authority or lawful agents of any state in controversy with another, should present a petition to Congress, stating the matter in question and praying for a hearing, following which the decision of the tribunal should finally determine the controversy. Pursuant to this provision the disputed claims of jurisdiction between Pennsylvania and Connecticut involving the strip of territory including the northern portion of the state and embracing the Connecticut settlements in the seventeen townships of Luzerne County were decided by the Decree of Trenton of December 30, 1782. The controversy about Vermont was settled under the Constitution; that between Pennsylvania and Virginia was settled by the extension of Mason and Dixon's line. Other controversies brought to the attention of the Continental Congress were settled by compact or abandoned.

The Federal Constitution continued this provision by placing within the judicial power controversies between two or more states and conferring upon the Supreme Court original jurisdiction of cases in which a state shall be a party. By the Constitution and according to the statute this original jurisdiction is exclusive over suits between states, though not exclusive over suits between states and citizens of another state. Whether a suit is brought against a state was a question formerly determined by the record, that is, whether the state was named as a party, but the modern rule is different. The nature

of the subject matter and the relief sought may be such that the state must be regarded as the real party, although state officers only are named in the record. The jurisdiction is of so grave and delicate a character, that it was not contemplated that it should be exercised save when the necessity was absolute, and the matter itself properly justiciable. While the jurisdiction includes some, it does not include all controversies. "The court cannot anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this court."[1]

The United States maintained an original suit for the recovery of a debt against the State of North Carolina in which the only question litigated was whether the state was liable for the interest upon certain bonds, and judgment went for the defendant. And a state may maintain such a suit against a sister state to recover a debt of which she is the real owner, but a state cannot by assuming the prosecution of debts owing by other states to her citizens create such a controversy as will give jurisdiction. Nor can a state maintain an action of debt upon a judgment for a penalty recovered against a defendant in one of her own courts.

A state may maintain a suit in the Supreme Court for the protection of her rights of property. The state of Pennsylvania brought a bill in equity against the Wheeling Bridge Company, in 1849, charging that the defendant under color of an act of Assem-

[1] Missouri *v.* Illinois, 180 U. S., 208 (1901).

bly of Virginia but in direct violation of its terms, was engaged in the construction of a bridge across the Ohio River at Wheeling which would obstruct the navigation to and from the parts of Pennsylvania by steamboats and other crafts; that the state owned certain valuable public works, canals, and railways constructed at great expense as channels of commerce for the transportation of passengers and goods, from which a large revenue, as tolls, was derived by the state; that these works terminated on the Ohio River and were contructed with reference to its free navigation, which would be so obstructed by the bridge as to cut off and diminish the business and revenue of the state. The bill prayed an injunction against the erection of the bridge, as a public nuisance. Of this case, so presented, it was said: "The State of Pennsylvania is not a party in virtue of its sovereignty. It does not come here to protect the rights of its citizens. The sovereign powers of a state are adequate to the protection of its own citizens, and no other jurisdiction can be exercised over them, or in their behalf, except in a few specified cases, nor can the state prosecute this suit on the ground of any remote or contingent interest in itself. It assumes and claims, not an abstract right, but a direct interest in the controversy, and that the power of this court can redress its wrongs and save it from irreparable injury. If such a case is made out the jurisdiction may be sustained." It was objected that there was no evidence that the state had consented to the prosecution of the suit. This would seem to be answered by the fact that

the proceedings were instituted by the attorney-general of the state. "He is its legal representative, and the court cannot presume without proof, against his authority.[1]" It appeared, however, that the legislature, in 1850, had directed the prosecution of the suit to final judgment and execution. A decree was entered in favor of the state, when Congress intervened and frustrated the proceeding by declaring the bridge to be a lawful structure.

The State of Missouri brought an original bill against the State of Illinois and the Sanitary District of Chicago, complaining of the drainage canal by which the waters of Lake Michigan and the Chicago River were diverted and carried into the Illinois River and thence to the Mississippi. The bill did not assail the drainage canal as an unlawful work nor aim to prevent its use as a water way, but sought relief against the flowing of filth and sewerage through it by artificial means, causing thereby as alleged, the contamination of the waters of the Mississippi River, and thus threatening the health and welfare of the inhabitants of Missouri. Jurisdiction was sustained and the cause ordered to be proceeded with. It was held that when the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. If Missouri were an independent and sovereign state she would seek a remedy by negotiation, and that failing, by force. These means having been surrendered to the General Government, the remedy is

[1] Pennsylvania *v.* Wheeling Bridge Co., 13 How., 518 (1851).

to be found in the federal jurisdiction.[1] The mere fact that the state has no pecuniary interest in the controversy will not defeat the original jurisdiction of the Supreme Court, which may be invoked by the state, as *parens patriæ,* trustee, guardian or representative of all or a considerable portion of its citizens.[2]

The State of Kansas complained that the State of Colorado had since 1890, constructed, and now owned and managed a canal for diverting the water of Arkansas River from its channel and using it on arid and non-riparian lands, so that it would not return to or again flow in the river and that it permitted the diversion into the canal of approximately the natural flow of the river at the place of diversion and the sale of water for the purposes of irrigation, and was extending and threatening to extend the existing canal and thus increase the diversion of the water to the injury of the state of Kansas, as an owner of property, and of the property and the lands of the inhabitants of Kansas bordering upon and depending upon the water supply of the river for their fertility. This complaint was held to present a controversy properly within the original jurisdiction of the Supreme Court.[3]

A different result was reached in the case of Louisiana against Texas. The former complained that the State of Texas had granted to its governor and

[1] Missouri *v. Illinois,* 180 U. S., 208 (1901).
[2] Kansas *v.* Colorado, 185 U. S., 125 (1902).
[3] Kansas *v.* Colorado, *supra.*

health officer extensive powers over the maintenance of quarantine against infectious or contagious diseases; that the power had been exercised in a way and with a purpose to build up and benefit the commerce of cities in Texas which were rivals of New Orleans, and prayed a decree for an injunction against the state of Texas, her governor and health officer, restraining the enforcement of the Texas laws in the manner in which they were enforced. It was held that in order to maintain the jurisdiction it must appear that the controversy was direct between the two states, and not one in vindication of the grievances of particular individuals; that Louisiana presented herself merely in the attitude of *parens patriæ,* trustee, guardian or representative of her citizens, and that it did not appear that the State of Texas had so authorized or confirmed the acts of her officials as to make them her own. In order to make a controversy between states justiciable something more must be put forward than that citizens of one state are injured by the maladministration of the laws of another. The states cannot make war or enter into treaties, though they may, with the consent of Congress, make compacts or agreements. Where there is no agreement whose breach will create it, a controversy does not arise unless the action complained of is state action, and the acts of state officers in abuse or excess of their powers, cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state. There must be a direct issue, and it is difficult to conceive of one in

respect of which no effort at accommodation has been made. Public policy forbids inquiry into the motives of a state legislature, or chief magistrate.[1]

The foregoing are the principal and most instructive cases involving controversies between states other than those relating to boundary. The Wheeling bridge case is included because of the principle involved and because the Wheeling Bridge Company exercised, or claimed to exercise, a public franchise, of the State of Virginia. The case of Louisiana against Texas points directly to the necessity for the employment of formal means for negotiation and for attempts at accommodation as preliminary to that condition of affairs of which it can be said that a controversy exists between one or more states. The attempt and failure to agree would create the controversy; the course of the negotiations would tend to bring the motive to light; the acts complained of would be avowed or disclaimed; the issue would be defined; but the question would remain as to whether the controversy were of such a nature as to be justiciable. And thus is indicated an important function of the American state executive in his relations with the executives of other states.

Questions of boundary have been of various origin and many of them of historical or legal interest. The conflicting locations or uncertain descriptions of royal charters, the relocation of lines adjusted by negotiation, changes in the courses of rivers, the as-

[1] Louisiana *v.* Texas, 176 U. S. (1900).

certainment of the boundaries of treaties of cession and other matters, have given rise to controversies of this kind. A dispute continuing from early times between New Jersey and New York, as to the waters and soil of the Hudson, the bay of New York, and the waters of Staten Island, was settled by compact in 1883. The grants to the Duke of York and to Carteret and Berkeley were bounded by the Delaware Bay and River and comprehended no part of either, and the charter to William Penn was bounded on the east by the Delaware, and so the right to the soil and the waters of the stream remained in the Crown; hence, after independence, in 1783 a compact was entered into between Pennsylvania and New Jersey by which it was agreed that the River Delaware should be a common highway for each state, with concurrent jurisdiction on the water, each retaining jurisdiction on the dry land between the shores, and that all offences or trespasses committed on the river should be cognizable in the state where the offender should be first apprehended; provision was made concerning fisheries. The New Jersey laws of 1808 and 1823 were later adopted in Pennsylvania and declared to have the same effect on citizens of that state, as on those of New Jersey. In 1785 Virginia and Maryland entered into a compact as to the Potomac; in 1787 North Carolina and Georgia as to the Savannah. By her deed of cession Georgia retained the soil and jurisdiction of the Chattahoochee and Virginia retained the soil and jurisdiction of the Ohio, so that the states northwest of the Ohio

are bounded at the low water mark. The boundaries of the states bordering on the Mississippi are at the thread of the main channel of that stream.

When the Revolution took place the people of each state became themselves sovereign and in that character had the absolute right to all their navigable waters and the soils under them, for common use, subject only to the rights surrendered by the Constitution, of which the principal are the regulation of commerce, the admiralty jurisdiction, and the treaty power. This right in the states included the marine belt, tide-water lands, the bed of the Mississippi River, within the National boundary, and the Great Lakes. The state may regulate fishing in navigable water wholly within its limits, both shell fish and floating fish. Thus in New Jersey the Amboy mud flats under water passed to the state, and one claiming title to an oyster bed there, under the state, had a better title than one who claimed under the proprietaries, who in 1702 had surrendered all their governmental powers. Massachusetts, by public statute provided that the territorial limits of the commonwealth extend one marine league from the seashore at low water mark. When an inlet or arm of the sea does not exceed two marine leagues in width between the headlands a straight line from one headland to the other is equivalent to the shore line. This definition corresponds with the recognized rule of international law, and places Buzzard's Bay within the municipal jurisdiction of Massachusetts. Fish and game are governed by similar principles and pertain to the state for the common right of the in-

habitants. The wild game within a state belongs to the people in their collective sovereign capacity. It is not the subject of private ownership, except in so far as the people of the state make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic or commerce in it, if it is deemed necessary for the protection or preservation of the public good. These subjects, and others of similar nature or depending upon similar principles, may be in the future, as some of them have been in the past, the matters of controversy or negotiation between states; and to them may be added in the future certain adjustments or commercial regulations tending to supplement the federal system and promote a general harmony of state and federal action, and measures embodied in concurrent legislation tending to uniformity of laws governing business and domestic relations and corporate franchises.[1]

The powers of the states must not merely remain *in posse,* they must be organized and used, and for this purpose a vigorous exercise of executive power must be provided for. A recent case in New Jersey tends to illustrate the general topic under discussion, and to indicate a tendency of the times. Its courts upheld the constitutionality of a statute making it unlawful for any person or corporation to transport through pipes, conduits, etc., the waters of any fresh water lake, pond or stream of New Jersey, into any other state. The suit was brought to restrain the defendants from supplying one of the boroughs of

[1] As to mineral oil and natural gas. Oil Company *v.* Indiana, 174 U. S., 190, 1900.

New York City with water from the Passaic River. The court held that neither under the common law nor the statutes of New Jersey was there any right in the riparian owner, as such, to divert the water of lakes or streams in order to make merchandise of it, or for any other than riparian uses, except as to a limited class of purposes beneficial to the state of New Jersey; that the state in its sovereign capacity controlled the fresh water lakes and streams, subject to the interests of the riparian owners, and that the legislature might prohibit the abstraction of such water save for riparian uses and for purposes authorized by legislative grants.

The Constitution provides that no state shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay. The terms "agreement" or "compact," taken by themselves, are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; those to which the United States can have no possible objection or have any interest in interfering with, as well as those which may tend to increase and build up the political influence of the contracting states so as to encroach upon or impair the supremacy of the United States, or interfere with their rightful management of particular subjects, placed under their entire control. However, there

are many matters upon which the different states may agree that can in no way concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York, which the latter might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, had desired to transport them a part of the distance over the Erie Canal, it would hardly have been deemed essential for that state to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that state in that way. If the bordering line of two states should cross some malarious and disease producing district, there would be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering states to agree to unite in draining the district, and thus removing the cause of the disease. So in cases of threatened invasion of cholera, plague, or other causes of sickness or death, it might be the height of absurdity to hold that the threatened states could not unite in providing the means to prevent and repel the invasion of the pestilence, without obtaining the consent of Congress, which might not at the time be in session. "The terms agreement and compact are therefore not to be construed to apply to every possible agreement or compact, but are to

be construed by the context, from which it is evident that the prohibition is directed to the formation of any combination tending to the increase of the political power of the states, which may encroach upon or interfere with the just supremacy of the United States; as for example, in the case of an agreement concerning a boundary line between two states, it will be within the prohibition of the Constitution or without it, according as the establishment of the boundary line may lead or not to the increase of the political power or influence of the states affected, and thus encroach or not on the full and free exercise of federal authority. . . . If the boundary established is so run as to cut off an important and valuable portion of a state, the political power of the state enlarged would be affected by the settlement of the boundary; and to an agreement for the running of such a boundary, or rather for its adoption afterwards, the consent of Congress may well be required But the running of a boundary may have no effect on the political influence of either state; it may simply serve to mark and define that which actually existed before, but was undefined and unmarked. In that case the agreement for the running of the line, or its actual survey, would in no way displace the relation of either of the states to the General Government." In many cases the consent of Congress may properly precede the agreement, but where it relates to a matter which could not well be considered until its nature is fully developed, the consent may be subsequently given and it may be implied from its recognition by Congress, where Congress

has acted upon the state of things created by the agreement.[1]

It results from the foregoing that, under the Federal Constitution as interpreted, not all controversies between two or more states are within the federal judicial power; that not all compacts or agreements between states are necessarily subject to the consent of Congress: and that therefore there is an undefined field of independent state diplomacy which naturally falls within the competence of the state executive.

In the institution of suits for the protection of the state the executive authority is sufficient in law without the aid of an express statute, but the exercise of the authority is governed by considerations of discretion founded upon the practical necessity, in many cases, of legislative countenance and support. In the defense of suits brought against the state the executive must act from the necessity of the case. The federal jurisdiction to proceed against the state attaches upon service of process upon the governor and attorney-general. The time for appearance is not fixed, in view of any contemplated intermediate legislative action. In the case of Rhode Island *v.* Massachusetts, the legislature of Massachusetts, after such service of process, passed a resolution authorizing the appearance of the state and the employment of counsel by the governor to defend the rights of the state. In the case of New Jersey against New York,[2] Chief

[1] Virginia *v.* Tennessee, 148 U. S., 503 (1893).
[2] 5 Peters, 284 (1831).

Justice Marshall said: "It has been settled by our predecessors, on great deliberation, that this court may exercise an original jurisdiction in suits against a state, under the authority of the Constitution and existing acts of Congress. The rules respecting the process, the persons on whom it is to be served and the time of service, are fixed. The course of the court on the failure of the state to appear after the service of process has also been prescribed. In this case the subpœna has been served as required by the rule. The complainant, according to the practice of the court and according to the general order made in the case of Grayson *v.* The Commonwealth of Virginia, has a right to proceed *ex parte,* and the court will make an order to that effect, that the cause may be prepared for final hearing." And the decree provided: that unless the defendant, being served with a copy of this decree sixty days before the ensuing August term of this court, should appear on the second day of the next January term thereof, the court would proceed to hear the cause on the part of the complainant and to decree on the matter of said bill.

There has been no settled usage as to the conduct of negotiations between states, but in general, special provision seems to have been made by legislative authority as the cases have risen and the appointment of special commissioners has been frequently provided for.[1] In the controversy between Kentucky

[1] In 1901, *e. g.,* legislative provision was made for the appointment by governors of not less than three boundary commissions.

and Indiana as to Green River Island, each state, in 1873, provided by legislative act for the appointment of commissioners to ascertain the boundary. Complaint being made of the action of the commissioners, the governor of Indiana directed the commissioner of that state to suspend any further action under the act. Subsequently, in 1877, upon the recommendation of the governor, the State of Indiana repealed the act authorizing the survey and authorized the governor to enter into negotiations with the governor of Kentucky, for the acquisition from the latter of all her rights of jurisdiction and soil in Green River Island, which by the course of nature was becoming a part of the mainland on the Indiana side of the Ohio River, or to establish the line in such manner as they might deem just, provided that the governor of Kentucky should be authorized to enter into the agreement by the legislature of that state. These efforts failing the governor was authorized to direct the prosecution of a suit to settle the boundary, and this was accordingly done.[1]

[1] Indiana *v.* Kentucky, 136 U. S., 479, 514 (1890).

CHAPTER XII

RELATIONS OF THE STATE EXECUTIVES WITH THE FEDERAL EXECUTIVE

By the Federal Constitution it is provided that Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress. The President is the commander-in-chief of the militia of the several states when called into the actual service of the United States. By the state constitutions the governor is commander-in-chief of the army and navy of the state and of the militia, except when they are called into the service of the United States, and they generally expressly provide that he shall have power to call forth the militia to execute the laws, suppress insurrection and repel invasions.[1]

The militia are therefore soldiers, enrolled for discipline, organized, and armed, as prescribed by Congress, officered and trained under the authority of

[1] See page 118, *et seq., supra.*

the states, and subject to be called forth by either state or federal authority to execute the laws, suppress insurrections or repel invasions. For many years after the adoption of the Federal Constitution, state laws provided for the enrolling and training of the militia in conformity with the legislation of Congress. It was usual to have annual, and in some states more frequent, days for drilling and training, and persons liable to military duty were compelled to attend under penalties; but for half a century or more there has been very little effort, if any, made to organize and train the entire body of the militia; that is, the whole population considered as liable to military duty; and all state laws designed to effect that purpose have either been repealed or suffered to fall into disuse under a settled conviction in the public mind that militia training, as it was practised in the states, was of no practical utility. Laws have been generally enacted for the organization of a more limited military force, usually known as the "National Guard."

It is no valid objection that the state law does not require the entire militia of the state as active militia. Such organization may be limited to a select corps, consisting of a defined number of men under the discipline of the regular army. Such bodies of men bearing arms and under military discipline are not "troops" within that provision of the Constitution which declares that no state shall, without the consent of Congress, "keep troops or ships of war in times of peace." Having provided for such an organization it is competent for the state further to

provide by law that persons may not associate themselves together as a military organization, or drill, or parade in arms in any city or town of the state without the license of the governor, as such prohibition does not violate the right of the people to keep and bear arms vouchsafed under the Federal Constitution or a law of Congress relating to the militia.

Until called into the actual service of the United States the militia are under the concurrent authority of state and federal regulation. So far as the latter provides for their organization, arming and discipline and for calling them forth, it furnishes the rule of action, but the states may provide ancillary or supplemental regulations for the better accomplishment of the ends of the service. When called into the actual service of the United States the federal law governs the militia and it is for Congress to define, according to the course of things, the time of their transition from the state to the federal service. This may be fixed by confining it to the selection of the men by draft, to the time of the issue of the order of the President calling them forth pursuant to the statute, or to the time of the arrival of the men at the place of rendezvous, or by any other circumstances. Under the act of 1795, arrival at the place of rendezvous was fixed as the time of entering into the service of the United States. But whether in the service of the state, or of the United States, the militia are governed by the proper military law.

There is a military law of each state consisting of statutes, authorized regulations, if any, and usages sanctioned by time; and these regulations and usages

generally conform to those of the federal service. Beyond its legitimate sphere the military jurisdiction gives away to that of the civil courts, but within its sphere it controls. The constitutional provision declaring the military to be in subordination to the civil power, does not take from the military authorities matters relating to the organization and government of the militia which are of a strictly military nature. Military law is fully recognized by the civil courts, and governs in peace as well as war. It is that law which relates to the organization, government and discipline of the military forces of the state. It is a rule superadded to the civil law for regulating the citizen in his capacity as a soldier and is binding upon those to whom it is intended to apply. Matters involving merely the organization of the militia are not within the jurisdiction of the civil courts; for example, the disbanding of a military company under the statutory authority, but without hearing the men disbanded; nor, in such cases, will alleged irregularity of action under the law be inquired into. The question of civil jurisdiction depends upon whether the matter in question involves merely the organization and discipline of the corps or whether any civil disability, fine or penalty attaches. In the latter cases a *certiorari* lies to inquire whether the matter is within the military jurisdiction, and, if so, whether the action taken or sentence imposed is authorized by law. "Should this court assume jurisdiction and interfere with the discretion of the military authorities, it would palsy an important arm of executive power created and sustained by the legislative branch for the preservation

of order and necessary, as events have proved, for the protection and preservation of civil government. The only safety for each department is to act within its legitimate sphere. There is no place on the bench for a military commander nor is there room in the same saddle for a court and a major-general."[1]

State rules and regulations merely disciplinary in their nature, designed to secure efficiency of service and providing penalties for disobedience to be imposed by courts-martial, do not fall within the constitutional provisions as to procedure and trial by jury. Such provisions are authorized by the legislative power over the militia. Courts-martial existed long before the constitutions and their existence is generally recognized in them, expressly or by implication. They are executive agencies, and belong to the executive and not the judicial branch of the government. "Deprive the executive branch of the government of the power to enforce proper military regulations by fine and imprisonment, and that too, by its own courts-martial, which from time immemorial have exercised that right and we at once paralyze all efforts to secure proper discipline in the military service, and have little left but a voluntary organization without cohesive power."[2] Courts-martial under state authority, are, under military law, similar in constitution, government and procedure, to those of the regular armies.

The governor, as commander-in-chief of the militia,

[1] Grove *v.* Mott, 46 N. J. L., 328; 50 Am. Rep., 424 (1884).
[2] State *v.* Wagener, 74 Minn., 518; 73 Am. St. Rep., 369 (1898).

may by virtue of his constitutional authority, provide rules for their government; but the legislature may also provide such rules, and if it do so the original authority of the governor is to that extent limited and he is charged with the duty of executing such laws. And to his authority as chief magistrate of the state may be added an authority under the President as his representative in executing the laws of the United States for calling forth the militia and effectively placing them in the actual service of the United States. In holding that the President in calling forth the militia might proceed by requisition upon a state for a quota of troops or by a direct order to the governor, adjutant-general, or other officer of the militia, prescribing the manner in which they should be drafted, detached and called forth, Justice Johnson suggested another distinction as to the governor's capacities. He said: "For when the constitution of Pennsylvania makes her governor commander-in-chief of the militia, it must subject him in that capacity (at least when in actual service) to the orders of him who is made commander-in-chief of all the militia in the Union. Yet, if he is addressed in that capacity, and not as the general organ or representative of the state sovereignty surely he has a right to be apprized of it."[1] At the time of the Whiskey Insurrection in Pennsylvania, in 1794, President Washington called for quotas of militia from the states of New Jersey, Pennsylvania, Maryland and Virginia; and the governors of New Jersey, Maryland and Virginia ap-

[1] Houston *v.* Moore, 5 Wheat., 1 (1820).

peared at the head of their respective detachments. President Washington, as commander-in-chief, visited the general rendezvous to direct the plan of ulterior movements, and, having accomplished his immediate purpose, left the chief command with the governor of Virginia. The governors of Kentucky and Ohio took the field and remained in command of their militia in the war of 1812.

It was held, in Pennsylvania, that the governor, as commander-in-chief, had no authority to order a court-martial for the trial and punishment of a militia man who failed to comply with an order to march, given through the governor, upon the requisition of the President, during the war of 1812. As the act of Congress provided for such a court-martial, it must be one held under federal law,[1] which made provision for such a court-martial and for punishment thereby for non-compliance with an order of the President; but there seemed to be a doubt as to whether a requisition amounted to an order. Judge Gibson, in a subsequent case, remarked that "it requires no great *astutia* to presume a delegation of power to the governor to enforce by court-martial the demand of the President." The State of Pennsylvania then provided by a statute for the punishment of militia men who failed to obey the order or requisition of the President. The validity of this act was sustained by the Supreme Court,[2] and in a subsequent case, under the federal statute, it was held that the President's requisition was in effect an or-

[1] *Ex parte* Bolton, 3 Serg. *v.* Rawle, 176.

[2] Houston *v.* Moore, 5 Wheat., 1 (1820).

der. It was further held that although not "employed in the service of the United States" so as to be subject to the rules and articles of war, yet the defendant was subject to punishment by court-martial for neglect to enter service upon order, and that it did not follow as a matter of statutory construction, that the court-martial must be one held under the act of 1795 or be constituted as therein provided. "It may be constituted according to the general usages of the military service, or what may not unfitly be called the customary military law."[1]

In an action for a false imprisonment brought against the governor of Wisconsin the plaintiff alleged that he was unlawfully held in custody from November 12, 1862, to January 19, 1863. And the defendant testified that the plaintiff was engaged in insurrection and riot against the laws of the state and of the United States, and was arrested on reasonable grounds, and held in custody no longer than in the opinion of the defendant was necessary to suppress the insurrection and enforce the laws. It appeared that the plaintiff took part in the proceedings of a mob which was strong enough to overcome the local civil authorities, who in fact sympathized with the rioters; that he painted the inscription upon their banner, No Draft; that he was arrested by the military acting under the immediate order of the provost marshal, who in turn was acting under the general orders of the governor. The governor was engaged in enforcing the order of the secretary of war and

[1] Martin *v.* Mott, 12 Wheat., 19 (1827).

the rules and regulations prescribed by the President, through the War Department, in appointing enrolling and draft officers, and enforcing the draft. The jury were instructed to find for the defendant, and the judgment was affirmed by the Supreme Court of the state. It was held that the acts of Congress of 1795 and 1862, which provided for the calling forth the militia, were valid; that the President had incidental authority to detach and draft the militia without the aid of state legislation; that the rules and regulations respecting the enrolling and drafting of the militia were valid; that the draft commissioner appointed by the governor was an officer of the United States; that the governor, acting under national authority and obeying the orders of the President, was also an officer of the United States, and that the parties concerned, acting under orders issued in the proper exercise of a valid discretionary authority, were within the rule of immunity applicable in such cases. It was held that the acts in question were in a certain sense the acts of the President, and the same principles applied as would to the case of a military commander, if he were sued for acts done by him in fighting a battle to put down an insurrection or rebellion, and that the prisoners might be arrested and detained so long as in the officer's judgment was necessary to prevent further obstruction to the draft, and until they would be safely turned over to the civil authorities for trial.[1]

[1] Drencker *v.* Solomon, 28 Wis., 621; 94 Am. Dec., 571 (1867).

Article IV, section 4, of the Constitution provides that the United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the Executive (when the legislature cannot be convened) against domestic violence. In 1839 President Van Buren, in a special message on the Maine boundary dispute, referred to the question of giving federal support to the authorities of the state of Maine in protecting that state against invasion. He said: "If the authorities of New Brunswick should attempt to enforce the claim of exclusive jurisdiction set up by them, by means of a military occupation on their part, of the disputed territory, I shall feel myself bound to consider the contingency provided for by the Constitution as having occurred, on the happening of which a state has a right to call for the aid of the federal government to repel invasion." State and federal authority co-operated in the negotiation of the Ashburton Treaty by which this controversy with Great Britain was adjusted.

Domestic violence has occurred in the states, calling for federal aid, under conditions of general lawlessness, competing state governments and disputed elections. President Grant acted upon the application of the governor of South Carolina in 1871: upon that of the legislature of Mississippi in 1874, and again upon that of the governor of South Carolina in 1876. President Hayes, during the railroad strikes of 1877, responded to the applications of the

governors of West Virginia, Maryland and Pennsylvania. President Harrison, in 1892, acted upon the application of the governor of Idaho.

In 1842, during the troubles in Rhode Island, known as Dorr's Rebellion, the governor made an application to President Tyler in which he certified that the state was threatened with domestic violence, that the legislature would not be convened in season, and that effectual protection under the Constitution was required. The President declined to act on the ground that a threatened insurrection did not furnish an occasion for federal aid; that there must be an actual insurrection manifested by lawless assemblages to whom, under the statutes, a proclamation might be addressed. The legislature of the state, afterwards convened, made a like application, but the President still declined to act, adding: "If resistance be made to the execution of the laws of Rhode Island by such force as the civil power shall be unable to overcome, it will be the duty of this government to enforce the constitutional guaranty." The President took precautionary measures, however, and directed the Secretary of War to proceed to Rhode Island, and, if necessary, to publish a proclamation which he had prepared, and to call upon the governors of Massachusetts and Connecticut for militia to co-operate with the regular troops then in Rhode Island. The known and determined attitude of the state and federal authorities caused the insurgents to disperse without an actual and forcible collision. In a case arising out of this disturbance the Supreme Court

held, among other things, that the action of the President amounted to a recognition of the ancient government of Rhode Island, that this action, subject to the correction of Congress, was a political determination and as such binding upon the courts and precluding any judicial inquiry into the asserted regularity of the supposed government of Rhode Island attempted to be set up under a constitution adopted by the followers of Dorr.[1]

An application of the governor of California in 1856, for an issue of arms and ammunition in aid of an effort to suppress the rule of the Vigilance Committee in that state, was declined on the ground that it did not appear that the legislature could not be convened; and it was doubted whether a mere request for arms and ammunition was within the meaning of the constitutional provision.

In 1872 different persons claimed the governorship of Louisiana and different bodies claimed to be the legislative assembly of the state. President Grant recognized those who held their credentials to office from the body, which appeared to him to be, and which, as the Supreme Court of the state afterwards decided, was, the legal returning board of the state, as the *de facto* government of the state, and supported it by federal troops in preserving the public peace. In 1874, the governor so recognized having been driven by violence from the state-house and compelled to take refuge in the federal custom-house,

[1] Luther *v.* Borden, 7 How., 1 (1848).

President Grant again intervened, and caused his reinstatement, deeming it to be his duty to maintain the government which he had recognized.

In the same year, he supported the governor of Arkansas, pursuant to an application made by a joint resolution of the legislature of the state for protection against domestic violence. In a subsequent controversy arising later in the year in consequence of the adoption of a new state constitution, he declined to interfere on the ground that the legality of the state government was then under investigation by Congress. In a message to Congress on this subject President Grant said: "The whole subject of executive interference in the affairs of a state is repugnant to public opinion and the feelings of those who, from their official capacity, must be used in such interposition, and to him or those who must direct. Unless most clearly on the side of law, such interference becomes a crime; and with the law to support it, it is condemned without a hearing. I desire therefore that all necessity for executive direction in local affairs may become unnecessary and obsolete."

In 1877 President Hayes found the state government of Louisiana in confusion and through Mr. Evarts instructed a commission to examine and arrange, if possible, the controversy, as follows: "An attentive consideration of the conditions under which the constitution and the acts of Congress provide or permit military intervention by the President in protection of a state against domestic violence has satisfied the President that the use of this authority in

determining or influencing disputed elections in a state, is most carefully to be avoided. Undoubtedly, as was held by the Supreme Court in the case of Luther *v.* Borden, the appeal from a state may involve such an inquiry as to the lawfulness of the authority which invokes the interference of the President in supposed pursuance of the Constitution; but it is equally true that neither the constitutional provisions nor the acts of Congress were framed with any such design." He pointed to the organization of a single legislature as a means for the solution of the difficulty. This organization having been effected, the legislature, as the lawful tribunal for that purpose, decided the disputed election for governor. The dispute as to Presidential electors had been decided by a likewise lawful tribunal, to-wit, the returning board, and so it happened, in a strictly lawful manner, that one party prevailed in the state election and another in the Presidential election.

The disturbances in 1894, commonly referred to as the Chicago Strike, affected twenty-seven states and territories, a vastly greater extent of country than President Lincoln proclaimed to be in insurrection in 1861. The strike interrupted the mails and interstate commerce of the United States carried by railroad. Instructions were given by federal executive authority to the civil officers of the United States to execute at Chicago the orders and process of the United States courts, to prevent the obstruction of the United States mails and generally to enforce the faithful execution of the laws of the United States and to support the marshal by such deputies or *posse*

as might be necessary. Soon after an order for the movement of federal troops in aid of the marshal was made and thereupon the governor of Illinois telegraphed to President Cleveland: "I am advised that you have ordered federal troops to go into service in the state of Illinois. As governor of the state of Illinois I protest against this and ask the immediate withdrawal of federal troops from active duty in this state." The President replied that the troops were there by federal authority and for federal purposes. "There has been no intention of thereby interfering with the plain duty of the local authorities to preserve the peace of the city." To which the governor rejoined: "The principle of local self-government is just as fundamental as that of federal supremacy. You calmly assume that the Executive has the legal right to order federal troops into any community of the United States, in the first instance, whenever there is the slightest disturbance, and that he can do this without any regard to the question as to whether the community is able and ready to enforce the law itself." The President's proclamation to insurgents appeared two days later and this was followed by the arrest on federal civil process of leaders of the strike, and the disturbance was soon ended. Nothing can more clearly illustrate the difference between protecting the state against domestic violence when her civil authority is unable to preserve the peace of the state, and the independent execution of federal law and process in the preservation of the peace of the United States.

In 1778 Gideon Olmstead of Connecticut, and

three associates, were captured by the British, and carried to Jamaica, where they were put on board the sloop Active bound for New York with a cargo of supplies. They rose upon the master and crew, took possession of the vessel, and steered for Little Egg Harbor. When in sight of land they were forcibly seized by the armed brig Convention, belonging to Pennsylvania, and taken to Philadelphia. The prize court of the state awarded to Olmstead but one-fourth of the prize money, but on appeal to the Continental Congress the judgment was reversed. The state court, in contempt of the award of Congress, turned the disputed fund over to Rittenhouse, the treasurer of the state, who kept it apart, and it passed into the hands of his representatives at his decease. After the adoption of the Constitution Olmstead instituted proceedings in the District Court to carry into effect the decree of Congress which resulted in the issue of an attachment against the representatives of Rittenhouse to compel the payment of the fund into court, after the Supreme Court of the United States had passed upon the merits of the case. The legislature of the state directed the governor to resist the execution of the process and he called forth the state militia under General Bright for that purpose, who resisted the marshal. He desisted, named a future day for the execution of the writ, and proceeded to summon a *posse* of two thousand men. The governor then appealed to President Madison, begging him to discriminate between factious opposition to the laws of the United States and resistance to judicial usurpation; but the President

replied that he was bound to aid in the enforcement of the decree. The state yielded. Olmstead received his money, and General Bright and others were prosecuted and convicted for forcible obstruction of federal process.[1] They were afterwards pardoned by the President on the ground that they had acted under a mistaken sense of duty. And thus was terminated the first forcible collision between a state and the federal Executive.

[1] U. S. *v.* Bright. Fed. Cas., 14647 (1809).

CHAPTER XIII

BOARDS AND COMMISSIONS

In the extension and adaptation of the machinery of government to meet new and unforeseen conditions, arising from the growth and congestion of population, the complexity and inter-relation of industrial processes, the supplanting of individual initiative by corporate activity, and many other physical economic and social causes, there has been developed a new variety of executive agency, called the Board or Commission, or Administrative Tribunal. It often partakes of the nature of all three of the departments, whose separation it has been one of the cardinal principles of our constitution to preserve; and has been characterized as a "fourth department."

For this agency, which is, in the states, more or less detached from the permanent tripartite machinery, as an experimental and transient means of meeting a new need until it can be classified and related to the permanent structure, prototype is found in the standing legislative committee. But from being an agency for procuring information and advice on difficult and specialized problems of which the legislators from varied occupations could not be expected to have expert knowledge, it has come into wider function, in some fields administering laws, with certain ordinance

powers of its own, and in others sitting with quasi judicial prerogative.

The growth of these boards and commissions has been rapid. The Governor of the State of New York, in his message of 1895, called attention to the fact that in 1880 "the expenditure for the duties covered by these commissions" was less than $4,000, whereas in 1894 they amounted to nearly a million and a quarter. The number of commissions and boards in the State of New York alone is now nearly a hundred. In Massachusetts, the first state to institute commissions of this character, the number is even greater, and in many other states of highly developed commercial and industrial interests such commissions are numerous.

The Year-book of State Legislation for a recent year shows this added provision; for the creation of a commission to codify divorce laws and co-operate with other states; for the appointment of county dispensers of liquors, and of license commissions, for the establishment of state chemical and biological laboratories and, in one state, of a hygienic laboratory; for the inspection of paris green and formaldehyde; for the maintenance of farmers' institutes; for the obligatory appointment of township, village or city inspectors of orchards and nurseries; for the subsidizing of weed agents; for the increase of sanitary officers; for the special care of defectives; for the appointment of probation officers; for the establishment of library boards to have care of traveling libraries to supersede the voluntary organizations, and of schools for library study; for the appointment of six boards

of veterinarians, of four state highway commissions, of a board for the control of irrigation, of a board of osteopathy, of a water supply commission, of boards of accountancy, of a board to award contracts for books to schools, of employment bureaus, of a state bureau of child and animal protection; of voting machine commissions, and of a commission on technical education;—in all one hundred and four new officers and boards were authorized in the various states in this one year.

Concerning the nature and general scope of duties of these State Boards and Commissions data have been carefully collected by Mr. Francis H. White and presented in the Political Science Quarterly in the year 1903. This classification is here followed and his data largely availed of.

The first class is that of industrial commissions, boards or officers: such as boards of agriculture, dairy and food, and horticulture, and inspectors of mines, oil, fish, livestock, grain, steamboilers, steamboats, workshops and factories. Of these the boards of agriculture are most widely existent. A majority of the states have such boards, created, where the motive is other than political, in the endeavor to advance agricultural industry and interests, by spreading information concerning best methods of cultivating the soil and concerning the stamping out of diseases prevalent among farm animals, by disseminating advice as to advantages of certain tracts for certain crops, and by contributing generally to the improvement of farming conditions through the furtherance of special studies and investigation, the fostering of farmers'

institutes and the publication of special literature. Closely resembling the boards of agriculture are those that have to do with horticulture, dairying, fish, live-stock, etc. To these are to be added: in South Carolina, the terrapin inspectors; in Kansas, the silk commission; in one state the tobacco inspectors and in another the bakery inspectors;—all indicative of organized official effort made to further and protect special industries. Differing in character from the boards of agriculture but in this same class of commissions are those charged with the duty of "looking after the quality of the staple articles of their respective states and of seeing that various means of manufacture, of power, of transportation, etc., are in proper condition." These have for their motive and object the protection of the health of the consumer, the good name of the state's products and, in some cases, the safety of the employees. Voluminous legislation has been enacted in recent years in behalf of these and like objects. The one general unspecialized board under this class, is the free employment bureau, established in Ohio and later in New York, to promote the availability of the labor supply.

The second class, the scientific boards and commissions, embraces boards of health, which are found in most of the states; bureaus of labor statistics, found in about one-half; boards of topographical or geological survey, found in about one-fourth; and boards or commissions of public records, forestry, weather service and drainage, and vaccine agents and chemists, found in very few. Most of these boards and officers are charged merely with the collection of

scientific data, but some have important executive functions, as the boards of health on occasion, in condemning property, isolating individuals, establishing quarantines and the like. Probably no other executive officer has more absolute power, within large limits of discretion than that given the health board. The example set by the State of Massachusetts in the establishment of a bureau of labor statistics, and now so creditably maintained, has been followed by most of the other states, though with varying success, and by other countries.

The third class is the supervisory, and includes, conspicuously, boards of arbitration, railroad commissions and commissioners of insurance, inland fisheries and game. To these have been added in a few states: boards to supervise corporations, gas and gas meters, building and loan companies. Of these supervisory commissions some are endowed with large powers of compelling compliance with orders of their own making, recourse being given, however, to the courts. Others have only inquisitory and advisory powers and can enforce their judgments or recommendations only through public opinion. There is every variety, from the board of commission of dictatorial power practically beyond removal by the governor who made the appointment, to the board which may see and speak but may not itself act. Permanent commissions to arbitrate labor disputes exist in a number of states and, in others, a way is provided for the creation of temporary commissions to meet special needs.

The fourth class is constituted of examining

boards. Among these, boards of registration in dentistry, medicine and pharmacy are found in many of the states and, in several, boards or commissions whose duties are to examine pilots, veterinarians, architects, nurses, bakers, horseshoers, barbers, plumbers, embalmers. In a few states civil service commissions exist for the examination and certification of those who seek the employ of the state. The object, as the influence, of these boards is to maintain a standard of efficiency within the professions or occupations over which they preside. One effect, to which attention has been called by those who have written upon this subject, is the restraint upon the free choice of occupation.

The fifth class is the educational. Boards of control of educational institutions and state boards of education are found in nearly all the states. In a few provision is made for the fostering of certain forms of education. The functions of these educational boards partake of the nature of the functions of some of the other classes as being examining, scientific and supervisory. The distinction is rather of object.

The next class is distinctive as to the nature of the function. It is the class denominated "executive." Boards and commissions of this class have as their object doing rather than inquiring; as, for example, the building of highways, the managing of great sewer and water systems, the laying out of parks, the constructing and repairing of levees and the selling of liquor. Here again Massachusetts has set the example. The commission with such function sprang

from a realization of the advantage to many neighboring communities of general systems of parks, water, sewerage and transportation, instead of a multiplication of little systems confined to the limits of each community. To these boards have been entrusted great engineering enterprises and the solution of great problems of transportation. The most important commission of this class is that recently created by the State of New York, the Public Utilities Commission, an extreme example of this executive agency, created by the legislature, though it does not determine its personnel; its members appointed by the governor yet not removable by him; possessed of certain judicial powers not yet subject in its decisions to the review of a court.

The last class is characterized by the title corrective and philanthropic. Among the bodies included in this class are state boards of police, charities and correction and lunacy. These represent the effort of the commonwealth to supervise and standardize certain services performed by the local communities, to insure for example that the public care of the insane shall be such as the intelligence and the means of the entire state may prescribe and make possible, rather than that which the ignorance of a given community may permit or its poverty compel. Here is presented, as is presented in fact by the existence of almost any one of these many boards, the question as to where the line giving boundary to local freedom and responsibility shall be drawn. This description of the various classes of boards, however, intimates to what extent the state has undertaken not only to secure ex-

pert advice for itself, but to inquire into conditions in its constituent communities and to bring these communities through the agency of supervisory, educational, philanthropic and other boards into compliance with the requirements of its better knowledge and larger view.

These commissions are generally constituted through appointment of the members by the Governor of the State, usually with the consent and advice of the Senate. The legislature often endows these boards or commissions with large powers and while these powers may be modified or withdrawn by legislative action, so long as they are resident in the board it is practically free of executive control, as the power of removal is either denied the governor or so conditioned as to make its exercise most difficult if not impossible. Thus the legislative power is enlarged by the creation of certain administrative offices, still kept, so far as they are dependent, within legislative control. In the federal realm these boards have given added influence and administrative power to the Executive, since they are usually placed under his direction and he has full power of removal as well as of appointment. The governor of the state is prevented from being in the same sense the administrative head of the state, partly by the fact that his power of appointment is more limited, all or nearly all the important executive and judicial officers being now elective, and partly by the other fact, that the executive boards of his appointment are generally beyond his control.

CHAPTER XIV

EXECUTIVE INITIATIVE IN LEGISLATION

It remains to say a word concerning the part which the governor of a state has in legislation. Reference is not now had to his veto power but to the initiating and procuring rather than the preventing of legislation. He is required by the constitution of the several states to communicate by message to the legislature, at every session, the condition of the state, and to recommend such matters as he shall deem expedient. This does not confer upon him legislative prerogative, but the message often gives suggestion and course to legislative action.

With a view to discovering to what extent such suggestion was effective, inquiry was in the summer of 1907 made of the governors of the states. Extracts from the answers from fourteen are here presented without identification of their authors:

1. "I believe the governor's initiative in legislation is of increasing influence and importance" (this in a state where the governor has not the power to veto).

2. "Of 53 matters proposed by the governor, 43 were acted upon favorably. Of the remaining 10, 4 were considered, but, on account of the inability of the two Houses to agree, were not enacted."

3. "With few exceptions, during the last two sessions of the legislature, executive recommendations were enacted into law. During the late session there were two

or three notable instances in which it was not done; but these were exceptions, and not the rule."

4. "The governor's recommendations are far more important than his veto power, and have great weight, not only with the legislature, but with the people."

5. "All the important measures urged by the governor in 1907 were enacted into law, and many of those of 1905."

6. "I think that the Executive's recommendations are having more and more influence upon legislative action. As I have watched the condition in several states during the past few years, it has seemed to me that the Executive's influence in this particular was decidedly on the increase. Veto amounts to practically nothing" (in this state).

7. "I think almost everything depends upon the personality of the governor. If he is a strong man and has the confidence of the people, his recommendations will have great weight with the legislature." (This governor urges that, if the governor desires certain legislation, he should see that the bill is carefully prepared, and then interest influential men in it and acquaint them with the arguments for and against.)

8. "The attitude of our governors toward legislation is more affirmative than negative. . . . I think that a great part of the important legislation in this state, for a decade at least, has followed such executive suggestions, though it may not have been the result of them." (Two of sixteen were followed by last legislature.)

9. "I do not believe that the office of Chief Executive is really increasing in importance in determining legislation but there is greater harmony between the legislative and the executive in giving expression to popular demands." (Governors have given first expression to these demands, and have been followed by the legislatures.)

10. "With few exceptions the suggestions of the present governor have been accepted by the General Assembly, and laws enacted in pursuance thereof. He has sparingly used the veto power, but has never been overruled by the

legislative body" (during three regular sessions and three special sessions).

11. "Substantially every recommendation which I made in my opening address to the legislature has been enacted into law. I interposed only two vetoes, and they were sustained." (It is to be added that the subjects upon which the principal recommendations were made were issues in the preceding campaign, and the governor and legislature were in accord.)

12. "I feel confident in stating that the Executive's initiative in legislation is increasing in influence and in importance."

13. "The legislature of the present year enacted into law practically all the measures suggested by the governor in his message to that body. I mention a few of these as indicating the general character of the legislation in several of the states; the anti-pass bill, two-cent fare bill, prohibiting contributions by corporations for political purposes, primary election bill, joint freight-rate bill, child labor bill, extension of pure food law, resolution asking Congress to call convention for amendment of Constitution, so that United States senators may be elected by the people."

14. The other answer came from a governor's office in a state where the conditions were somewhat similar to those in New York. The governor and the legislature were not in sympathy but the governor appealed to the people, and a number of his recommendations were enacted into law.

While all these *ex-parte* answers indicate with one or two exceptions a disposition on the part of legislation to follow executive suggestion, it is apparent even from these letters that it is not a servile following, and it is plainly stated or intimated by two or three that they both follow an imperative public opinion, the governor having the first opportunity to respond,

and so giving unintentionally the impression of leading, whereas he, too, but follows. It is apparent, too, that the Chief Executive has found a way of compelling legislation, while punctiliously observing the legislative limitations of his office; that is, by appealing to public opinion to make itself felt in the legislature. There is certainly no menace in the power of the Chief Executive of the Commonwealth. He has too little. Greater centralization of administrative power and unity of effort are here desirable. But at the same time it is manifest that he has ceased to be in some states, if not in all, the "mere hands of the legislative brain," as Mr. Bryce characterized him, whose merit "is usually tested by the number and boldness of his vetoes."[1]

To what is accomplished in legislation through the initiative of the Governor is to be added what takes its beginning in the recommendation of other executive officers and especially of boards and commissions.

[1] And see Reinsch American Legislatures, p. 273 *et seq.* American State Series.

CHAPTER XV

THE PRESIDENT

That the federal Executive bears close resemblance to the state executive in his powers was emphasized in the Federalist. It was there stated[1] that the authorities of the chief magistrate of the Nation were, in few instances greater, in some instances less, than those of the governor of New York, though they had been magnified into more than royal prerogatives. Through ignorance, fear, or a partisan imagination, the President "has been decorated with attributes superior in dignity and splendor to those of a king of Great Britain. He has been shown to us with the diadem sparkling on his brow and the imperial purple flowing in his train. He has been seated on a throne . . . giving audience to the envoys of foreign potentates, in all the supercilious pomp of majesty. The images of Asiatic despotism and magnificence have scarcely been wanting to crown the exaggerated scene."

In contrast with this it was pointed out that the term of the President was four years, that of the governor of New York three years; that both were reeligible; that the President was subject to impeachment, as were the governors of New York, Delaware

[1] Federalist, No. 67.

and Maryland; that his veto power was like that of the governor of Massachusetts; that as the state governors, he was a commander-in-chief, but without power to declare war or raise fleets and armies; that his power to pardon did not extend to impeachments, while that of the governor of New York did, although treason and murder were excepted from the latter; that the President's power to adjourn the legislature existed only in case of a disagreement between the two houses, while the governor of New York had power to prorogue the legislature for a limited time; that treaties required the concurrence of the Senate, while the King of Great Britain could make them without the necessity of a ratification by Parliament; that in respect of the treaty power the President, from the nature of the respective governments, differed from the governors of the states; that the power of the President to receive ambassadors was more a matter of dignity than authority; that his power of appointment was exercised with the concurrence of the Senate, while in New York appointments were made by the governor and a council of four senators who were chosen by the Assembly, the governor claiming and frequently exercising the right of nomination and entitled to the casting vote. The conclusion of this paper was that except in the case of treaties it was difficult to say whether the President possessed more or less power than the governor of New York.

This similitude of the Presidential office to that of the commonwealth governor has emphasis through the contrast which this same paper makes between the powers of the President and the powers of the king

as the latter were then understood. "He [the President] can confer no privileges whatever; the other [the king] can make aliens, denizens, and noblemen of commons, can erect corporations with all the privileges incident to corporate bodies. The one can prescribe no rules concerning the commerce or currency of the Nation, the other is in several respects the arbiter of commerce and in this capacity can establish fairs and markets, can regulate weights and measures, can lay embargoes for a limited time, can coin money, can authorize or prohibit the circulation of foreign coins. The one has no particle of spiritual jurisdiction, the other is the supreme head and governor of the national church."[1]

The differences have further emphasis by one of our chief justices. In deciding that territory under military occupation in Mexico was not to be considered as a part of the United States because the President was without power to extend the limits of the Nation by conquest, Chief Justice Taney said: "It is true that most of the states have adopted the principles of English jurisprudence so far as it concerns private and individual rights, and when such rights are in question we habitually refer to the English decisions not only with respect, but in most cases as authoritative. But in the distribution of political powers between the great departments of government there is such a wide difference between the power conferred on the President of the United States and the authority and sovereignty belonging to the British

[1] But see Sir Henry Maine's *Popular Government.*

Crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide."[1]

The interpretation of the Constitution is necessarily influenced by the fact that its provisions are framed in the language of the English common law and are to be read in the light of its history. The language of the Constitution could not be understood without reference to the common law. The code of constitutional and statutory construction gradually formed by the authoritative judgments of the courts in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as is implied in the subject, and constitutes a common law resting on national authority.[2] And contributions to this common law resting upon national authority are not limited in source to the judicial power. Executive and legislative precedents are likewise resorted to in the interpretation of the Constitution. The constitution of every nation is practically what it has become by the practical construction of those in authority, acquiesced in by the people.

As the common law of England, in its explanations of the royal prerogative, was resorted to for the interpretation of the delegated powers of the colonial

[1] Fleming *v.* Page, 9 How., 618 (1849).
[2] Smith *v.* Alabama, 174 U. S., 465 (1888).

governors, and as these powers, similar in nature but different in source, when devolved upon the state governors, were interpreted in like manner, so the powers of the federal Executive have been explained by the common law of England, the colonies, and the states. Thus the powers of the President as commander-in-chief are to be ascertained by reference to the law and usage of the military service as it existed when the Constitution was formed.[1] As the pardoning power "has been exercised from time immemorial by the executive of that Nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."[2]

Many other executive powers vested in officers of the United States are interpreted by the common law, *e. g.*, those of the attorney-general. The marshals in the several districts are by statute given the powers vested in the sheriffs by the laws of the several states, and these in turn receive their principal explanation from the common law. Executive grants, letters patent and commissions are likewise so explained. In the conduct of foreign affairs the executive power is guided, restrained and explained by the law of nations and in the conduct of military operations it is interpreted by the laws of war. And it is chiefly

[1] Swaim *v.* U. S., 165 U. S., 553 (1897).

[2] Chief Justice Marshall in U. S. *v.* Wilson, 7 Peters, 162 (1833).

in respect of the powers of war and treaty that the description of the powers of the federal Executive involves more than does the description of the state executive, as far as the nature of their powers is concerned. As to the methods of their exercise and the relations of the executive with the legislative and judicial powers, the differences are differences in detail, but not in principle.

The President exercises his official functions wherever he may be. A resolution of inquiry of the House, in 1876, directed to President Grant, seemed to imply that these functions should be exercised at the seat of government, but he replied that "the necessity for the performance of executive acts by the President of the United States exists and is devolved upon him, wherever he may be in the United States, during his term of office, by the Constitution of the United States. His civil powers are no more limited or capable of limitation as to the place where they shall be exercised than those which he might be required to discharge in his capacity of commander-in-chief of the army and navy, which latter powers it is evident he might be called upon to exercise, possibly, without the limits of the United States. No act of Congress can limit, suspend or confine this constitutional duty."

For the facilitation of executive business which had grown enormously, President Johnson found it necessary to make an executive order directing that all communications upon public business, including suggestions for legislation, claims, contracts, employment, appointments and removals, and pardons, be

transmitted directly and in the first instance to the proper department. President Cleveland in a like order said that "a due regard for public duty, which must be neglected if present conditions continue, and an observance of the limitations placed upon human endurance," obliged him to decline all personal interviews with those seeking appointments to office, except upon his invitation. "Applicants for office will only prejudice their prospects," he added, "by repeated importunity, and remaining in Washington to await results."

The President's signature is affixed to bills, pursuant to the Constitution, and is required by statute to be affixed to some instruments, but as a rule his verbal direction is sufficient in law. His official acts which are of a public nature are preserved of record in the Department of State, unless more immediately connected with the duties of some other department. Ordinarily and in practice the direction of the President is merely theoretical. In exceptional cases he will be applied to by the head of a department, who will receive and act upon verbal directions. But the President may choose to give written directions and "the historical responsibility, and perhaps the legal, may be partially shifted" in this manner.[1]

Although it is the duty of the President to take care that the laws be faithfully executed, he is not required to execute them himself. He does not perform the duties required by law to be performed by subordinates and has no authority to interfere in

[1] Cushing, 7 Atty. Gen. Op., 596.

their regular performance. Their completed acts have that validity which the law imparts. Where a statute required the special direction of the President for certain disbursements, it was held that they were properly made under general instructions to the secretary of the treasury, who acted without more specific authorization. It was held unreasonable to ascribe to Congress a purpose "which must defeat every end they have in view and render the government an absolutely impractical machine."[1]

"The President speaks and acts through the heads of the respective departments in relation to the subjects which pertain to their respective duties.[2] And their acts are, in legal contemplation, the acts of the President. As a general rule official instructions and orders issued by heads of departments, civil and military, within their respective jurisdictions are lawful and valid without containing any express reference to the direction of the President. Acts of military commanders in conducting the operations of war, and especially in territory in military occupation are by the presumed authority of the commander-in-chief.[3] Personal action of the President has been held necessary in cases of sentences of courts-martial and in the issue of licenses to trade under non-intercourse acts, but instances in which the power of the President to act by delegation has been successfully challenged are rare, as likewise are instances in which acts done by the presumed authority of the President

[1] Williams *v.* U. S., 1 How., 290 (1843).

[2] Wilcox *v.* Jackson, 13 Peters, 498 (1839).

[3] Mechanics' Bank *v.* Union Bank, 20 Wall, 278 (1874).

have been denounced by him as usurpations. General Hunter's proclamation of emancipation may be referred to as a case of the latter sort. The President will not review, on appeal, the acts of heads of departments or subordinate officers. But he may interfere to restrain an officer from usurping an authority, which does not belong to him, as well as to compel the officer to perform the duty that does belong to him, and may for these purposes, entertain an appeal.[1]

It was said by Mr. Wirt to be a rule of action prescribed to itself by each administration to consider the acts of its predecessors conclusive so far as the Executive is concerned; "Otherwise decisions might be opened back to the presidency of Washington, and the acts of the Executive kept perpetually unsettled and afloat." Many official acts are of such a nature that, once done, the official power is exhausted, *e. g.*, an order dividing the United States into convenient collection districts, pursuant to an act of Congress. An executive error may, however, be corrected, and an act erroneous in part may be partially sustained if in its nature, divisible. President Cleveland revoked a proclamation of President Arthur as to an Indian reservation on the ground that it violated an Indian treaty and should therefore be deemed to be inoperative.

The President's power to institute and conduct investigations of affairs within his jurisdiction is subject to some practical limitations. Pending an in-

[1] Pierrepont, 15 Atty. Gen. Op., 102.

vestigation of conditions in the New York Custom House, directed by President Tyler, the House of Representatives, in 1842, requested information as to the authority under which the commission had been appointed, its objects and expenses and "out of what fund such expenditures have been or are to be paid." The President held that his authority was that conferred by the Constitution, which required him to take care that the laws be faithfully executed. By act of the twenty-sixth of August, 1842, the payment of commissioners or agents thereafter to be appointed was prohibited except out of specific appropriations to be made by law. Attorney-general Nelson in 1843 agreed to the existence of the executive power to investigate, but said: "Congress, by refusing appropriations to sustain it, may thus indirectly limit this power and thus paralyze a function which they are incompetent to destroy."

All authorities agree that the President's power over money in the treasury is governed by the constitutional provision as to appropriations, but the rule is also general that where the Constitution or an act of Congress authorizes the President to do a thing which requires the expenditure of money, he may lawfully do it or contract to have it done, in the absence of an appropriation for the object, and the cost of the thing done thus becomes a lawful charge on the government. "This doctrine might be illustrated by examples drawn from affairs both of peace and war. The annual deficiency bills are full of pertinent illustrations of the question."[1] In gen-

[1] Cushing, 6 Atty. Gen. Op. 28.

eral his power of disposal over the public property and debts due the United States, depends upon statute, but he may direct the restoration of property in the custody of the United States to its lawful owner, though seized for condemnation by process of law.

The power of the President, exercised through the attorney-general or proper district attorney over the institution, prosecution and discontinuance of judicial proceedings, civil and criminal, in the name of the United States, has been exercised from the foundation of the government, but has not passed without question. In 1827 the attorney-general advised that he "entertained no doubt of the constitutional power of the President to order the discontinuance of a suit . . . for it is one of his highest duties to take care that the laws be faithfully executed, and consequently that they be not abused by any officer under his authority or control, to the grievance of any citizen." And the same power and duty enable him to order the institution of suits to protect the public and private rights and enforce the execution of the laws of the United States.[1]

In the execution of the statute law questions of construction frequently arise requiring executive determination in the first instance, often depending upon the familiar distinctions as to whether the statute is enabling, discretionary, directory, or mandatory. Sometimes the Executive has suspended the execution of a law pending a reference to Congress

[1] U. S. *v.* San Jacinto, 125 U. S., 273 (1887). U. S. *v.* Bell Telephone Co., 128 U. S., 316 (1888).

to ascertain whether an error has not been made in its enactment. Often the President has no discretion, as where the law defines the thing to be done by a given head of a department, and how he is to do it; but if there is no such explicit direction as to how or by whom an executive act is to be performed, it is for him to supply the direction in virtue of his powers under the Constitution, he remaining always subject to that, to the analogies of statute, and to the general rules of law and right. This view according to high authority has been followed uniformly in the practical administration of the government.[1]

"It happens continually," says this same authority, "that phrases of doubtful apparent significancy in regard to constitutional powers are found in acts of Congress. It would not be convenient to establish as a rule that the President must refuse to approve all such acts however useful and just on the whole they made be. It is more convenient to follow the customary routine of the government, reducing any such questionable phrase to its true constitutional value by construction when the law comes to be construed and administered. Thus when the statute says that every collector of customs shall have authority with the approbation of the secretary of the treasury to employ inspectors, it must be construed to mean that the secretary may appoint and remove such inspectors."[2]

The uniform construction of a statute made by an executive department in the conduct of its affairs is

[1] Cushing, 6 Atty. Gen. Op., 326.
[2] Cushing, 7 Atty. Gen. Op., 276.

given great weight by the courts, and in a case of doubt is sufficient to turn the scale.[1] But the courts will not follow a construction that is manifestly wrong nor permit a settled departmental construction to be overturned by a new official where the first construction, though inconsistent with the literalism of the act, was in accordance with the equities of the case.[2] A continued and uniform construction produces certainty and equity of administration, and it may and frequently does acquire an implied sanction from Congress that gives it to some extent the force and authority of law itself, as, where Congress may be presumed to know the usage and practice that has been pursued in carrying into effect one of their enactments and pass another similar act, they must be understood as expecting and intending that it shall be carried into effect according to the same construction.[3]

Acts containing provisions clearly unconstitutional have not unfrequently been carried into effect so far as valid, but in disregard of the unconstitutional parts. In all cases of plain and obvious conflict between the provisions of a statute and the Constitution, not only the judiciary department of the government, but every department required to act upon the subject matter, must determine what the law is and obey the Constitution. "But in cases where the conflict in law is doubtful, and its existence has been made out by argument, I think it more prudent

[1] Brown *v.* U. S., 113 U. S. 568 (1885).

[2] U. S. *v.* Alabama Railroad Co., 142 U. S., 615 (1892).

[3] Crittenden, 5 Atty. Gen. Op., 562.

for the administrative officer to follow the statute, and leave the party who may be dissatisfied with the decision to seek his remedy in the courts." And this is the general executive rule.[1]

The constitutional duty of the Executive to give from time to time to the Congress information of the state of the Union is usually performed by transmitting the annual message and reports, by sending special messages from time to time, addressed to either House or to Congress, and by laying before Congress or either House documentary information of various kinds.

President Washington in 1790, instituted the practice of making confidential communications to Congress. The matter related to negotiations with the Southern Indians. Negotiations with Spain, 1793, and Algiers, 1793, were similarly communicated. President Adams continued the practice, *e. g.*, in the affairs with France, 1798. In transmitting to the Senate documents relating to the Oregon negotiation, President Polk said: "The Senate will perceive that extracts from out two of Mr. McLane's dispatches are transmitted and those only because they were necessary to explain the answers given to them by the secretary of state. These despatches are both numerous and voluminous and from their confidential character their publication, it is believed, would be highly prejudicial to the public interests. . . . I am not only willing but anxious that every senator who may de-

[1] Bates, 10 Atty. Gen. Op., 56; and see 295. U. S. *v.* Realty Co., 163 U. S., 427 (1896).

sire it shall have an opportunity of perusing these dispatches at the Department of State."

The practice of the Senate in holding executive sessions (that is, sessions for the performance of its functions as council to the Executive) without publicity, is well known, as is also the practice of the Senate in making requests for information in confidence. The following gives instance of such a request as well as intimation of the proper procedure. In 1844 President Tyler in a message to the Senate, replying to a resolution of that body adopted in executive session addressed to the secretary of the treasury *ad interim*, and by him communicated to the President, said that while he could not recognize "this call, thus made, on the head of a department as consistent with the constitutional rights of the Senate when acting in the executive capacity, which in that case can only properly hold correspondence with the President of United States," nevertheless he would and did transmit the information called for.

The President has always exercised a discretion as to giving or withholding information upon the request of either House for it. Thus President Washington declined to communicate to the House of Representatives the correspondence relating to the British Treaty. President Jackson in 1833 withheld certain pending matters relating to the Maine boundary dispute; and President Tyler in 1842 declined to lay before the House of Representatives the condition of the same affair. President Polk in 1845 in like manner withheld information from the Senate as to the pending proceedings for the annexation of Texas, and in

1848 declined to lay before the House the instructions given as to the negotiation of the treaty with Mexico. President Fillmore declined to comply with a request of the Senate made in legislative session for information as to negotiations with the Sandwich Islands. President Buchanan declined to lay before the Senate the correspondence relating to the slave ship Wanderer, and President Lincoln likewise declined on March 26, 1861, to communicate Major Anderson's dispatches from Fort Sumter. These instances are referred to as examples of a general practice.

The secret session of the Senate is a survival of the early practice;[1] all of the sessions of this body being held in secret until 1794. When it was conditionally resolved by the Senate in 1826, to debate the question of the Panama Congress with open doors and the resolve was sent to President John Quincy Adams with a request for his opinion, he respectfully answered that all communications from him to the Senate relating to the Congress at Panama had been made, like all other executive business, *in confidence*, and most of them in compliance with a resolution of the Senate requesting them confidentially; and added: "Believing that the established usage of free confidential communication between the Executive and the Senate ought, for the public interest, to be preserved unimpaired, I deem it my indispensable duty to leave to the Senate itself the decision of a question involving a departure, hitherto, so far as I am informed, without example, from that usage, and upon the motives

[1] Woodburn, The American Republic, p. 211.

for which, not being informed of them, I do not feel myself competent to decide."

Requests made on heads of departments by committees of Congress or by either House, for information on matters relating to ordinary and current legislation, may with propriety be answered without passing through the Executive office. But it would seem proper, as has been held, that communications involving radical changes in existing general statutes affecting public policy should be submitted through the President for his information and opportunity for expression of his views if desired; the head of each department to determine the necessity for such manner of transmission. Subordinate officers of the several departments ought not to communicate directly with Congress, its committees or members, on matters involving legislation, except through the heads of departments.

The executive function does not include the preparation of proposed legislation nor any supervision of legislative proceedings until bills are duly presented for executive action after their passage by Congress. Instances are not wanting, however, of the transmission to Congress, by the Executive, of drafts of bills, with a recommendation for their enactment. As Professor Burgess states, there is full constitutional warrant for the construction and presentation of regular bills and projects of law to Congress by the President. That his recommendations are not so presented has explanation in the fact that there exist no "executive organs for presenting, explaining, defending and in general managing such government

bills in Congress."[1] This custom of initiating and promoting legislation in this manner might have grown up under our Constitution, says Professor Woodburn: "If Hamilton, in defending his financial measures before Congress in 1790, had appeared in person instead of sending a written report it is conceivable that the precedent might have been followed, and the Cabinet ministers might have been allowed the privilege of defending their measures on the floor of either House."[2] Whether such a practice would have given the President a greater influence in legislation than the present form of recommendation, is debatable, as is also Professor Burgess' statement that the latter permits the President to exercise no "real initiation in legislation."

The conduct of the affairs of state includes vastly more than the enactment of laws by the legislative and their execution by the executive branch. Much of the legislative product is not law at all, in the sense of being a rule of civil conduct prescribed by the supreme power in the state for the government of individuals, but is in effect a series of authorizations, decrees, or permissions designed to authorize or facilitate the accomplishment of particular ends or to enable transactions. The effect intended is not to execute law but to do business. And in respect of such matters the relation of the Executive with the legislature is one of intimate co-operation.

Frequently this co-operation proceeds upon the ba-

[1] Burgess, Political Science and Constitutional Law, Vol. II, p. 254.

[2] Woodburn, The American Republic, p. 145.

sis of a tacit understanding between the Executive and Congress. Thus in requesting an appropriation for the Lewis and Clark Expedition, President Jefferson said: "The appropriation of $2,500 'for the purpose of extending the external commerce of the United States' while understood and considered by the Executive as giving the legislative sanction, would cover the undertaking from notice and prevent the obstructions which interested individuals might otherwise prepare in its way." The appropriation of $2,000,000 after a secret session of the House to be applied under the direction of President Jefferson, is also in point. President Jackson called the attention of Congress to the executive construction put upon a law and intimated that he would not continue to act upon it "unless Congress, after having the subject distinctly brought to their consideration, should virtually give their assent to such construction." Referring to a former communication to Congress by President Monroe, President Buchanan said: "Nothing was done by Congress to explain the act, and Mr. Monroe proceeded to carry it into effect according to his own interpretation. This, then, became the practical construction." And in a subsequent message President Buchanan notified Congress of his continued adherence to the old construction. President Grant communicated his action in recognizing one of the competing state governments of Louisiana and asked for legislative direction. In a subsequent proclamation, he set forth: "Congress at its last session, upon due consideration of the subject, tacitly recognized the said Executive and his

associates, then as now in office, by refusing to take any action in respect thereto." In 1875 he communicated his action in permitting the landing of French ocean cables upon certain conditions prescribed by him in the absence of legislation, and the non-action of Congress, in this and later instances likewise communicated, has resulted in establishing an executive practice of regulating, subject to any future legislation by Congress, the landing of submarine cables on the coasts of the United States.

As a rule, in communicating with Congress the President does not take specific notice of their proceedings, or debates, beyond the limits of strictly official intercourse except in rare instances where such reference is necessary to explain some matter in controversy. President Washington referred to the House debate on the British Treaty; Presidents Jackson, Tyler and Buchanan, in their protests, took minute notice of the proceedings against which they were directed, and in a message as to private pension bills in 1886, President Cleveland said: "I am so thoroughly tired of disapproving gifts of public money to individuals who in my view have no right or claim to same, notwithstanding apparent congressional sanction, that I interpose, with a feeling of relief, a veto where I find it unnecessary to determine the merits of the application. In speaking of the promiscuous and ill-advised grants of pensions, I have spoken of their 'apparent congressional sanction' in recognition of the fact that a large proportion of these bills have never been submitted to a majority of either branch of Congress, but are the result of

nominal sessions held for the express purpose of their consideration and attended by a small minority of the respective Houses of the legislative branch of the government."

The assumption of purity of motive and openness of purpose is the usual basis of intercourse between the President and Congress. Thus President Cleveland said: "It has been urged as an objection to this measure [the oleomargerine bill] that while purporting to be legislation for revenue, its real purpose is to destroy, by the use of the taxing power, one industry of our people for the protection and benefit of another. If entitled to indulge in such a suspicion as the basis of official action in the case, and if entirely satisfied that the consequences indicated would ensue, I should doubtless feel constrained to interpose Executive dissent, but I do not feel called upon to interpret the motives of Congress otherwise than by the apparent character of the bill which has been presented to me." An exception is presented, however, in a communication of President Johnson who questioned the truth of the recital, in the preamble of the first Reconstruction Act, that no adequate protection for life, and property existed in the states in question, and said the bill seemed to show on its face that the establishment of peace and good order was not its real object. The language of President John Quincy Adams' message, which was understood by senators to impute bad motives, has been quoted above.

Express references to the current or prevailing principles of political parties as such have been rare in executive communications. Occasionally, appeals

have been made to public opinion or the judgment of history, as in President John Quincy Adams' message on the Panama Conference, and President Grant's on San Domingo. President Lincoln urged a reconsideration of the proposed Thirteenth Amendment in view of the condition of public opinion indicated by the results of the recent elections. Messages of congratulation upon the accomplishment of important measures have not been unusual.

Executive methods relating to the approval of bills and the exercise of the veto power have received a general explanation in a previous chapter.[1] It remains to speak of the Presidential use of these legislative powers—powers which enable the President often to prevent the enactment of laws of which he disapproves, even if he may not initiate and procure the legislation he desires.

The veto power was but rarely put to use in the first forty years. The view prevailed that it was to be exercised for the purpose of protecting the Constitution and the executive department from legislative encroachment. It was thus regarded as a check or barrier rather than a means of negatively determining public policy. It was not the subject of discussion in the official utterances of the President until after President Jackson's re-election. In his second inaugural he referred to it as a means of arresting encroachment of the General Government upon the states, and he employed it to defeat measures hostile to his personal or party policy. President Van Buren

[1] See Chapter VI.

pointed to the usage, which has prevailed since his time as it had before, not to veto appropriation bills on the sole ground of their extravagance. President W. H. Harrison expressed the view that the President had no part of the legislative power and that the use of the veto was repugnant to the leading democratic principle under which the majority should govern. He urged that it should not be employed in ordinary legislation, supporting this view by recalling that the veto had never been used by the first six Presidents save on the ground of want of conformity with the Constitution or because error had been committed by too hasty action. To these grounds for executive interference he thought might be added the prevention of legislative action inequitable in its effect upon all parts of the Union or violative of the rights of minorities. He believed with Mr. Madison "that repeated recognitions, under varied circumstances, in acts of the legislative, executive and judicial branches of the government, accompanied by indications, in different modes, of the concurrence of the general will of the Nation" afforded the President sufficient authority for considering disputed questions as settled.

President Tyler held that the President was bound by his oath of office to act upon his convictions. "He has no alternative. He must either exert the negative power entrusted to him by the Constitution for its own preservation, and defence, or commit an act of gross moral turpitude. Mere regard for the will of a majority must not, in a constitutional republic like ours, control this sacred and solemn duty of a sworn officer. . . . It must be exerted against a mere

representative majority or not at all. . . . The duty is to guard the fundamental will of the people themselves." In another paper he said: "When I was a member of either House of Congress, I acted under the conviction that to doubt of the constitutionality of a law was sufficient to induce me to give my vote against it; but I have not been able to bring myself to believe that a doubtful opinion of the chief magistrate ought to outweigh the solemnly pronounced opinion of the representatives of the people and the states."

President Polk vetoed three bills, one for the payment of the French spoliation claims and two for local improvements. In his last annual message he made an elaborate examination of the veto power. He held that it was the highest duty of the President to preserve the Constitution from infraction; that he was bound in every case to use his best judgment; that any attempt to coerce this judgment was a violation of the Constitution; that the veto was one of the safeguards adopted by the people for protection against wrong from their own representatives, whose fallibility they recognized; that the true theory of our system is not to govern by the acts or decrees of any one set of representatives; that the people have by the Constitution commanded the President as much as they have commanded the legislative branch to execute their will and that in withholding his approval he executes that will. A bill does not represent their will as a law, unless approved or enacted in the mode prescribed. The President equally with each House of Congress is the representative of the

people and responsible to them. The principle of equal representation of states in the Senate is opposed to the principle of rule by popular majorities;[1]—the vice-president may exercise an effectual veto by his casting vote and has repeatedly done so,—and it is not true that an act of Congress is of necessity an emanation of the popular will. A majority of a quorum in the House might represent a mere fraction more than one-fourth of the people; a majority of a quorum in the Senate might be made up of senators from the smaller states; a full vote in either House is rare, and many votes have been close. "If the principle insisted on, be sound, then the Constitution should be so changed as to require that no bill shall become a law unless it is voted for by members representing in each House a majority of the whole people of the United States." The power of veto must be used to protect minorities either of people or states. It was intended to protect the state sovereignty as well as to check the popular will, and it is as much a part of our constitutional system as the judicial authority, which may also be effectively interposed against popular but unconstitutional measures.

President Taylor regarded the interposition of the veto as an extreme measure. President Fillmore

[1] Thirty-two million of people in ten states are represented by 20 senators, while twenty-nine million people in other states have a senatorial representation of 68. On February 1, 1896, the senate substituted a free silver bill for the Treasury Relief Bond Bill passed by the House by a vote of 42 to 35, but the minority represented nearly 8,000,000 more than the majority. Ford, Rise and Growth of American Politics, 273.

was more liberal in his view of its use. President Pierce held that the Constitution required the President to make a decision in each case upon his conscientious convictions, deferring in case of doubt to the expressed opinion of Congress and relying much on their investigation and information.

President Johnson appealed to Congress against encroachments upon the Executive and quoted Mr. Jefferson in the view that the concentration of powers in the same hands "is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands instead of by a single one. One hundred and seventy-three despots will surely be as oppressive as one."

President Grant vetoed a bill because it was a "departure from true principles of finance, national interest, national obligations to creditors, congressional promises, party pledges (of both political parties) and personal views and promises made by me in every annual message sent to Congress and in each inaugural address." In another message[1] he recommended a constitutional amendment authorizing a partial veto with a view to protection against abuses and the waste of public moneys which creep into important measures in the expiring hours of Congress. President Arthur recommended such an amendment for the veto of items of appropriation bills. And President Cleveland summed up the general subject with the remark, "It is difficult to understand why,

[1] Fifth annual message.

under the Constitution, it should be necessary to submit proposed legislation to Executive scrutiny and approval, except to invoke the exercise of Executive judgment, and invite independent Executive action."

From the organization of the government under the Constitution to the end of President Cleveland's second term, the number of bills vetoed was about five hundred. Authorities differ slightly. The figures, including pocket vetoes upon which messages were written and bills informally or irregularly presented, seem to be four hundred and ninety-seven, of which the number regularly vetoed appears to be four hundred and eighty. Two hundred and sixty-five of these were private pension bills, of which five were vetoed by President Grant and the remainder by President Cleveland. Of private bills, other than pension bills, seventy were vetoed; of local or special bills, eighty-seven. The remainder, seventy-five in number, including bills for the admission of states into the Union, are classified as general bills. Of these seventy-five, President Washington vetoed two, Madison three, Jackson six, Tyler five, Polk one, Pierce three, Buchanan three, Lincoln two, Johnson eighteen, Grant nine, Hayes ten, Arthur three, Cleveland eight, Benjamin Harrison two. Of Presidents who served full terms, John Adams, Jefferson and John Quincy Adams did not use the veto, nor did W. H. Harrison, Taylor, Fillmore or Garfield.

The two-thirds vote required to overcome a veto has been construed to be a vote of two-thirds of the members present. A formal vote upon the return of a bill was the rule down to President Lincoln's time;

since then the practice has been otherwise in a large majority of instances. No important bills were passed over the veto prior to President Johnson's time. Of those since, the River and Harbor Bill of 1882 and the Bland Bill under President Hayes are the notable instances. The first instance of passage over the veto occurred in the time of President Tyler.

Of bills vetoed upon constitutional grounds eleven, besides ten reconstruction measures, which included other grounds, were vetoed as encroachments upon the Executive. President Madison vetoed two special bills as tending to an establishment of religion, and these, with some of the Reconstruction measures, are all of those objected to as infringing the bill of rights. Only one veto (by President Madison) was based on supposed encroachment upon the judiciary. Two vetoes have related to the organization or powers of either house, apportionment and adjournment. President Hayes vetoed two bills as unduly discriminating in favor of the state and against the federal authority. The remainder, vetoed upon constitutional grounds, forty in number, were objected to as encroachments upon the powers of the states, although no bill was ever vetoed as a measure injurious to the states. All were in the form of benefit intended to be conferred. President Jackson said: "We are in no danger from violations of the Constitution by which encroachments are made upon the personal rights of the citizen. . . . But against the dangers of unconstitutional acts which, instead of menacing the vengeance of offended authority proffer local advantages, and bring in their train

the patronage of the government, we are, I fear, not so safe. To suppose that because our government has been instituted for the benefit of the people, it must therefore have the power to do whatever may seem to be for the public good, is an error into which honest minds are too apt to fall. In yielding themselves to this fallacy they overlook the great considerations upon which the Federal Government was founded." Of the forty in the class last mentioned, twenty-one were for internal improvements, others were for donations of public lands or their proceeds, the distribution of seeds, or for refunding the direct tax.

Most of the measures defeated upon constitutional grounds by the exercise of the veto were in such form or for such purposes that the judicial power could not have been invoked for the purpose of testing their validity as laws. In this has the great value and effect of the veto power been practically demonstrated.

Thus, as Mr. Bryce points out, while "the strict legal theory of the rights of the head of the state" is in the matter of the veto "exactly the same in England as in America, it is now "the undoubted duty of an English king to assent to every bill passed by both Houses of Parliament, however strongly he may personally disapprove the provisions; it is the no less undoubted duty of an American President to exercise his independent judgment in every bill, not sheltering himself under the representatives of the people or foregoing his own opinion at their bidding."

The powers and functions of the Executive are well explained by different Presidents in resisting from time to time the encroachments, intentional or otherwise, attempted by Congress, or in declaring the position of the Executive in various incidents as they have taken place. There follows a recital of such of these expositions as seem best to define the boundary of Executive powers and to give barrier to the powers of the other departments.

President Fillmore, in responding to a resolution of inquiry pointed out the distinction between the constitutional powers of the President according as they related to the militia or to the army and navy. Legislative authority is requisite for calling forth the former, but no such authority was necessary in his opinion to enable the President to employ the army and navy in the execution of the laws, "and probably no legislation of Congress could add to or diminish the power thus given, but by increasing or diminishing, or abolishing altogether, the army and navy."

President Buchanan commented upon a provision of an act designating Captain Meigs as superintendent of the work of the Washington Aqueduct and construed it merely as a recommendation. "I have deemed it impossible that Congress could have intended to interfere with the clear right of the President to command the army and order its officers to any duty which he might deem most expedient for the public interest." President Johnson signed the army appropriation act of 1867 under protest. It contained a provision, said to have been inserted at the

instance of Mr. Stanton, that all orders should pass through the general of the army, who was required to keep his headquarters at Washington and it was provided that he should not be removed, suspended, relieved from command, or assigned to duty elsewhere, except at his own request or by the approval of the Senate. This in effect, so President Johnson held, virtually deprived the President of the command of the army. Jefferson Davis vetoed a bill because it interfered with his control of the general of the army, and the Confederate House sustained him by a vote of sixty-eight to one.

President Hayes objected to a bill because it deprived the civil officers of the United States of all power to keep the peace at the congressional elections, and to another because "the President is required to give his affirmative approval to positive enactments which in effect deprive him of the ordinary and necessary means of executing laws still left on the statute book and embraced within his constitutional duty to see that the laws are faithfully executed."

President Grant called attention to a clause in the consular and diplomatic appropriation bill of 1876, directing certain officers to "close their offices." Admitting the power of Congress over appropriations he asserted the Executive power to constitute and grade diplomatic officers. In 1877 he vetoed two joint resolutions directing the secretary of state to convey the appreciation of Congress of congratulatory resolutions of the Argentine Republic and the Republic of Pretoria on the centennial anniversary of

American independence. He held such action by Congress to be improper because the President was the sole organ of diplomatic intercourse and only harm and confusion could follow such a precedent. He called attention to the fact that this government had not recognized the Republic of Pretoria.

President Jackson resisted the intimation of the Senate that citizens of one state should not be appointed to office in another. And, holding the refusal of the Senate to confirm his nominations of directors in the United States Bank to be unwarranted, he renominated them and declared his intention to name no others.

President Grant vetoed a bill because it imposed duties upon the clerk of the House of Representatives which properly pertained to the Executive Department.

President Arthur vetoed a bill for the relief of Fitz John Porter because, in effect, it named an individual for appointment to office. President Benjamin Harrison vetoed a bill on similar grounds, and as a thing not to be permitted for places of active duty. "In connection with the army and navy retired lists legislation akin to this has been frequent, too frequent in my opinion, but these laws have been regarded as grants of pensions rather than as offices."

President Hayes in his message of 1880 argued for a complete divorce between Congress and the Executive in the matter of appointments to office. He recommended the repeal of the Tenure of Office Act enacted in 1867, amended in 1869, and carried into the revision of 1874. It was originally enacted over the

veto of President Johnson in 1867, was contrary in principle to the settled practice of the government from its organization; it was of at least doubtful constitutionality;[1] the alleged disregard of its provisions by President Johnson in the case of Mr. Stanton was the principal ground of impeachment of the President: although materially modified in objectionable parts on the accession of President Grant, he recommended its total repeal; and it was finally repealed in 1887, in consequence of sturdy blows dealt it by President Cleveland.

It is a general principle that any valid act done by either the legislative, Executive or judicial branches of the government is binding upon each of the others, and is not subject to be set aside by either of them. In maintenance of this principle President Cleveland vetoed a bill providing that the action of a naval retiring board be set aside and that a certain officer be retired, notwithstanding the action of the board. He held that the judgment of the board ought not to be reversed. A further illustration is furnished in President Lincoln's repeated declaration of his purpose to maintain the effect of the Emancipation Proclamation. "Nor shall I," he said, "return to slavery any person who is free by the terms of that proclamation, or of any of the acts of Congress. If the people should, by whatever mode or means, make it an Executive duty to re-enslave such persons, an-

[1] But there was never a test of the validity of these acts in the courts. Cases intended to raise it were decided on other grounds. See U. S. *v.* Perkins, 116 U. S., 483; Parsons *v.* U. S., 167 U. S., 324.

other and not I must be their instrument to perform it."

Another Executive act in point is that of President Harrison. It having been held by the Supreme Court that an order revoking the dismissal of an officer was ineffectual to restore him to the service, as that could only be effected in the regular way through nomination and concurrence of the Senate, a joint resolution by Congress, relating to a similar revocation, the officer having then been restored and retired, declared the retirement legal and valid. It was vetoed by President Benjamin Harrison among other reasons, because the declaration was contrary to the law and the decision of the Supreme Court. Incidentally the decision of the Court protected the Executive power.

President Jackson, under whom the independence of the Executive was not only redoubtable, but aggressive, refused to comply with a request of the Senate for a copy of a paper read by him to his Cabinet relating to the removal of the deposits. "Feeling my responsibility to the American people, I am willing upon all occasions to explain to them the grounds of my conduct, and I am willing upon all proper occasions to give to either branch of the legislature any information in my possession that can be useful in the execution of the appropriate duties confided to them. Knowing the constitutional rights of the Senate, I shall be the last man under any circumstances to interfere with them; knowing those of the Executive I shall at all times endeavor to maintain them

agreebly to the Constitution and the solemn oath I have taken to support and defend it."

Illustration of President Tyler's attitude in maintenance of Executive integrity has been given. Another of importance is added: The House of Representatives in 1842 requested information from President Tyler and heads of departments as to what members, if any, of the Twenty-sixth and Twenty-seventh Congresses had been applicants for office. Declining to comply with this request the President said: "All appointments to office made by a President become, from the date of their nomination to the Senate, official acts which are matters of record and are at the proper time made known to the House of Representatives and to the country. But applications for office, or letters respecting appointments, or conversations had with individuals on such subjects are not official proceedings" unless the President shall think proper to lay them before the Senate. Except as stated all such matters are within Executive discretion and confidence "and are therefore beyond the right of the House of Representatives to hear and its duty to know."

In 1886 President Cleveland demonstrated that the principle laid down by President Tyler as to applications for office included correspondence with the Executive touching the conduct of officials and upon which in his discretion he might act in deciding upon suspensions from office or otherwise. Vindicating the action of the attorney-general in declining, by his direction, to comply with a request of the Senate for

papers and documents bearing upon the conduct of the office of a suspended district attorney, he held that the papers in question were not official, that his direction of the attorney-general was not, as suggested in a report of a committee of the Senate, "upon the assumption on my part that the attorney-general or any other head of a department is the servant of the President and is to give or withhold copies of documents in his office according to the will of the President and not otherwise; but because I regard the papers and documents in this office, withheld, and addressed to me or intended for my use and action, purely unofficial and private, and frequently confidential, having reference to the performance of a duty exclusively mine. I consider them as in no proper sense upon the files of the department, but as deposited there for my convenience, remaining still completely under my control. I suppose if I desired to take them into my custody I might do so with entire propriety and if I saw fit to destroy them no one could complain. . . . There is no mysterious power of transmutation in departmental custody, nor is there magic in the undefined and sacred solemnity of department files."

The general discretion of the President under considerations depending upon his judgment of the public interest and welfare, to give or withhold information, and especially in matters pertaining to our foreign relations, was explained by President Washington in his message to the House of Representatives on the British Treaty in 1796, and it has since

been the frequent and continuous practice of the Presidents to exercise such a discretion.

President Jackson, in 1835, asserted the necessity for the independence of the Executive in communicating with Congress, in matters pertaining to foreign affairs, the occasion being the action of France consequent upon his recommendation in a former message that Congress should authorize reprisals to coerce France to comply with the Treaty of 1831. The principle is now generally recognized and acted upon that communications and transactions between Congress and the President short of actual enactment, are not properly the subject of diplomatic notice or explanation.

By the act of 1810 disbursements from the contingent fund for expense of foreign intercourse under the Department of State might be accounted for under the certificate of the President in cases in which he did not deem it advisable to specify the object and in which, in his judgment, the object should not be made public. In 1846 the House requested an account of disbursements from this fund made in connection with the Northeastern Boundary dispute. President Polk declined to comply on the ground that the request of the House was inconsistent with the law governing the subject which in placing such expenditures under the seal of confidence, was obligatory upon the House and himself, the action of his predecessor having been final in determining their character. Incidentally it appeared that the amount disbursed was $5,460. He vindicated the propriety

and necessity of the provision in question and showed that the practice had been recognized and provided for by Congress from the organization of the government.

A resolution passed by either house, or a concurrent resolution has not the effect of law. It is merely an expression of the opinion of Congress upon a public question. Resolutions of this character are not subject to veto (as is the "Joint Resolution" which acquires validity only through the President's signature) and are employed often because of the known hostility of the President. To such resolutions the President often answers by action, sometimes by protest. The following are in illustration.

In the paper read to the Cabinet in 1833, President Jackson referred to a resolution of the House of Representatives in relation to the safety of the deposits. He thought the question was now influenced by new disclosures of serious import, and held that in any event a resolution of the House could not control a discretion vested by law in the Executive.

President John Quincy Adams resented an expression by resolution of an opinion of the Senate as to the proper rank of an appointee.

President Jackson held that a resolution of the Senate could not justify him in withholding a patent for public lands, contrary to the requirements of law.

Protesting in 1834, against the Senate resolution of censure upon the removal of the deposits, President Jackson said: "Without notice, unheard and untried, I thus find myself charged upon the records of the Senate, and in a form hitherto unknown in our

history, with the high crime of violating the Constitution and laws of my country. . . . The President of the United States has therefore, by a majority of his constitutional triers, been accused and found guilty of an impeachable offence, but in no part of this proceeding have the requirements of the Constitution been observed. . . . It is because it did not assume the form of an impeachment that it is the more palpably repugnant to the Constitution." He protested against the action of the Senate as unauthorized by the Constitution, contrary to its spirit and to several of its express provisions, subversive of the distribution of the powers of the government and as tending to concentrate in the hands of one body not directly amenable to the people, a degree of influence and power dangerous to their liberties and fatal to the Constitution of their choice.

President Tyler in 1842 protested against the action of a select committee of the House of Representatives to which was referred his veto of the tariff bill. "In the absence of all proof, and as I am bound to declare, against all law or precedent, in parliamentary proceedings . . . it has assailed my whole official conduct, without the shadow of a pretext for such an assault, and stopping short of impeachment, has charged me with offences declared to deserve impeachment."

President Buchanan protested against the unfair and illegal methods of the Covode Committee. "The lion's mouth at Venice into which secret accusations were dropped, is an apt illustration of the Covode Committee. The Star chamber, tyrannical and offi-

cious as it was, never proceeded in such a manner. For centuries there has been nothing like it in any civilized country, except the revolutionary tribunal in France in the days of Robespierre."

Reference has been made in the discussion of the powers of the state executive to the virtual limitation of the power of veto by the compulsion under which he is put in most states of either approving or disapproving a bill in its entirety. Such attempt to restrict the federal Executive has met with occasional protest and veto, as the following instances witness:

President Tyler vetoed a bill because it united two incongruous subjects and thus put a constraint upon the Executive. President Pierce denounced as revolutionary a "rider" placed upon the Army Appropriation Bill in 1855. President Johnson made like protest, when a veto would have been futile, against a rider to the Army Appropriation Bill of 1867 which virtually supplanted him as commander-in-chief. President Hayes made such riders upon appropriation bills a ground of veto. President Hayes' contention was that under such a practice a "bare majority of the House will become the government," bringing into subjection to it the functions of the Senate and President, that the independence of the departments is thus menaced and that public opinion was against this form of legislation. This precedent has been effective. The country would doubtless, if new occasion arose, express resentment at such attempted coercion.

The ineffectiveness of all barriers of Executive veto and protest has exemplification and test in an ad-

ministration in which a hostile Congress is sufficiently of one mind to pass measures over the Executive veto and so firm in the support of public opinion as to be indifferent to Executive protest. These conditions were presented in President Johnson's administration and the result was a "degradation of the Presidency." The barriers yielding under such pressure, the President became powerless in legislation and practically powerless as an executive through the loss of the power of removal.

In 1866 the army regulations were made fixed and unalterable without the consent of Congress; the power of dismissal of army officers in time of peace except throught court-martial was taken from the President; his power over the army was subjected to the advice and the consent of the general whose signature was necessary to the validity of orders; the power of removal and hence the control of civil service was transferred to the Senate by the Tenure of Office Act; the President was deprived of the power of appointment of justices of the Supreme Court by an act reducing their number from nine to six as vacancies might occur; a test of the validity of the Reconstruction Acts in the Supreme Court was frustrated by repealing their appellate jurisdiction in *habeas corpus*. These acts substituted the military commander for the President in matters of appointment. The fourteenth amendment limited the President's power of pardon and the veto power was nullified by a steady constitutional majority.

The impeachment of President Johnson subjected our constitutional system to a final test; and a study

of the events of his administration will put in the clearest light the views of varying color concerning the constitutional relations of the Executive and legislative powers. The relation which existed in that administration is exhibition of the one extreme—the relation in which the President becomes the minister of the legislature, deprived of volition, of discretion, of direction and command. It is a long distance to the other extreme, in which the legislature takes direction of an Executive who is in popular confidence, has an effective veto and a fearless but discriminating power of removal. Both relations are possible and have been existent within the bounds of the Constitution.

CHAPTER XVI

THE CABINET

The Executive departments whose heads comprise what is known as the "Cabinet" have been constituted by acts of Congress. The Department of State dates from July 27, 1789, being then denominated the Department of Foreign Affairs; the Department of War from August 7, 1789; that of the Treasury from September 7, 1789; the Navy Department from April 30, 1798, and the Interior Department from March 3, 1794. Although the act of September 22, 1789, provided for the temporary establishment of the post-office, and the appointment of a postmaster-general, it was not until 1829, that he came into the Cabinet. An act under date of September 23, 1789, allowed a salary to the attorney-general and the Judiciary Act provided for the appointment of that officer; business of a departmental character was devolved upon him by later statutes, and by the act of June 22, 1870, his duty was extended to a general superintendence of the administration of justice. It was under this act that the Department of Justice was organized. The Department of Agriculture was created by act of 1889 and that of Commerce and Labor by the Act of February 11, 1903.

The Constitution provides that the President may

require the opinion in writing of the principal officer in each of the Executive departments upon any subject relating to the duties of his respective office, and that the Congress may vest the appointment of such inferior officers as it may think proper in the President alone, in the courts of law, or in the heads of departments. It assumes that Executive departments will be created, but it neither names them nor confers authority upon them or their principal officers; and the authority to require their opinions in writing is limited to the affairs of the department of each, respectively.

The device of an executive council was well known to the framers of the Constitution, but it did not constitute one.[1] The "collegiate existence" of the heads of departments was not even assumed or contemplated by the Constitution, as is evident from the defence of the single executive which appeared in "The Federalist." "That unity is conducive of energy will not be disputed. Decision, activity, secrecy and despatch will generally characterize the proceeding of one man in a much more eminent degree than the proceedings of any greater number, and in proportion as the number is increased, these qualities will be diminished. This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority, or by vesting it ostensibly in one man, subject in whole or in part, to the control, and co-operation of others, in the capacity of counselors to him. Of the first the two

[1] Save in so far as the Senate was given power of advice and consent to appointments and treaties.

consuls of Rome may serve as an example; of the last we shall find examples in the constitutions of several of the states. . . . Both these methods of destroying the unity of the Executive have their partisans; but the votaries of an executive council are the most numerous. . . . The idea of an executive council, which has so generally obtained in the state constitutions, has been derived from that maxim of republican jealousy, which considers power as safer in the hands of a number of men than of a single man. If the maxim should be admitted to be applicable to the case, I should contend that the advantage on that side would not counterbalance the numerous disadvantages on the opposite side. But I do not think the rule at all applicable to the Executive power. I clearly concur in opinion in this particular with a writer whom the celebrated Junius pronounces to be 'deep, solid and ingenious'[1] 'that the Executive power is more easily confined when it is *one'*; that it is far more safe there should be a single object for the jealousy and watchfulness of the people; and, in a word, that all multiplication of the Executive is rather dangerous than friendly to liberty. . . . A council to a magistrate, who is himself responsible for what he does, are generally nothing better than a clog upon his good intentions, are often the instruments and accomplices of his bad (intentions), and are almost always a cloak to his faults." [2]

As will appear from the result of the practical

[1] DeLolme.

[2] Federalist, No. 70.

working of the Constitution, the extra-legal character of the Cabinet, considered as an executive council, combines the aid of united wisdom with single responsibility and avoids the objections made by the "Federalist" to an executive council, legally constituted, and with substantial powers of control. "It is a privy council and not a ministry."[1]

President Washington, before deciding upon important policies, called for the opinions in writing of the attorney-general and other heads of departments, and not infrequently called them together for consultation. This was the origin of the Cabinet and Cabinet meetings. In one instance at least, these officers acted together, adopting joint rules signed by them as to the political and military questions pending between the United States and France. As is well known, Washington's Cabinet was made up of men of widely differing opinions, a result of his view that the Presidency should be above party. Under the administration of the elder Adams there was no great change in usage, but the secretaries, probably because they regarded the President not as one to whom they owed their place,[2] seemed to assume a more independent attitude and to regard themselves as "co-ordinate integral parts of the Executive Department."[3] In the time of Jefferson, the Cabinet, whose members he thought should be "of his own bosom confidence," and in party harmony, assumed the more definite shape which it now retains,

[1] Burgess, Political Science, Vol. II, p. 191.

[2] Schouler, History of U. S. Vol. I, p. 344.

[3] Woodburn, The American Republic, p. 191.

though he seems to have regarded individual consultation to have been "more constitutional," saying that the open Cabinet "transformed the Executive into a directory."[1] With this President the ties of official intercourse became "almost as tender as a family relation." President Jackson called the postmaster-general into consultation and from his time to the present the only important changes have been like accessions due to the creation of new departments.

As is to be inferred from the absence of constitutional provision, there is no legal obligation resting upon the President either to consult the heads of departments or to follow their advice when given. And should they object to being consulted as a body, "he could not point to any specific clause in the Constitution which requires such an organization or which authorizes him to require opinions in such a form."[2] It is stated upon the authority of one of its members, that President Jefferson did not ask the advice of his Cabinet upon the Louisiana Purchase; and President Jackson and doubtless many other Presidents acted against the advice of the Cabinet. President Lincoln made the first decision respecting the Emancipation Proclamation without consulting his Cabinet, and President McKinley is understood to have resolved upon the annexation of Hawaii contrary to the views of his secretary of state.[3]

The executive theory of the relations of the President with the heads of departments is that where the

[1] Schouler, Vol. II, p. 14.

[2] Burgess, Political Science, Vol. II, p. 263.

[3] Foster, Century of American Diplomacy.

law confers a discretion upon one of them, that discretion is subject to his discretion and control. This theory received an elaborate consideration and statement from Attorney-General Cushing. After reciting the relevant terms of the acts of Congress constituting the several Executive departments, he said: "But through all these successive changes in detail, the theory of departmental administration continued unchanged, viz: Executive departments with heads thereof discharging their administrative duties in such manner as the President should direct, and being in fact the executors of the will of the President. All the statutes of departmental organization, except one,[1] expressly recognize the direction of the President, and in that one, the Interior, it is implied, because the duties assigned to it are not new ones, but such as had been exercised by other departments. It could not, as a general rule, be otherwise, because in the President is the Executive power vested by the

[1] In Fairlie's review of the Directional Powers of the President (Michigan Law Review, Vol. II, 201), he excepts also the Treasury Department, holding that the "direction" in contemplation is indicated by the context to be that of Congress and not of the President. The post-office service was also organized, according to his view, without any reference to Presidential control or direction. In support of the earlier conception of the President's narrower power of direction is quoted a decision of the federal courts to the effect that the President may not lawfully control the judgment of an officer whose duties are absolute and specific and not by law made subject to control and direction of any superior officer who is by law especially authorized to direct how those duties are to be performed. But, as he states, even before this decision was uttered (U. S. *v.* Kendall, 5 Cranch, C. C., 163,

Constitution, and also because of the constitutional provision that he shall take care that the laws be faithfully executed, thus making him, not only the depository of the Executive power, but the responsible Executive minister of the United States."

And again he said: "I hold that no head of a department can lawfully perform an official act against the will of the President, and that will is by the Constitution to govern the performance of such acts. If it were not thus, Congress might, by statute, so divide and transfer the Executive power as utterly to subvert the government, and to change it into a parliamentary despotism, like that of Venice or Great Britain, with a nominal Executive chief utterly powerless,—whether under the name of doge or king, or president, would be of little account so far as regards the maintenance of the Constitution." To this statement of the scope of Presidential directional powers he made the following exceptions: matters purely ministerial, such as legal attestations, certificates or warrants, or such acts as are compellable by judicial *mandamus* involving no discretion and prescribed by positive law; and also matters committed to the officer *designatio personæ*, as a special tribunal or the like, as, for example, to adjudicate treaty claims.

272), it had been effectively overruled by the action of President Jackson in forcing the secretary of the treasury to remove the government deposits from the United States Bank. The President "demonstrated his authority and established a precedent; and so long as the power of removal is not restricted it is clear that the President can in fact control the action of any administrative officer."

In another passage Attorney-General Cushing pointed out that the heads of departments had a threefold relation: to the President, whose political or confidential ministers they are, to execute his will, or, rather, in his name and by his constitutional authority to act in cases where the President has a legal or constitutional discretion; to the law, for when the law has directed the performance of certain acts and when the rights of individuals depend upon those acts, then, in such case the head of the department is amenable to the law; to Congress, for the heads of departments are created by this body, most of their duties are prescribed by it and it may at all times call on these heads for explanation, or information in matters of official duty, and may, if it see fit, interpose by legislation when required by the interests of the government.[1]

Commenting upon the foregoing Attorney-General Bates said: "While in theory the heads of departments are executors of the will of the President, in fact it is quite impossible for him to assume practical direction of detail, though he may exercise a discretion when to interpose.[2]

Senator Sherman in his Recollections gives a different view from that presented by Attorney-General Cushing. Referring to President Grant and his Cabinet he says: "The impression prevailed that the President regarded these heads of departments, invested by law with special and independent duties, as mere subordinates whose functions he might assume.

[1] Cushing, 6 Atty. Gen. Op. 326; 7 Atty. Gen. Op. 596.
[2] 10 Atty. Gen. Op., 527.

This is not the true theory of our government. The President is entrusted by the Constitution and laws with important powers, and so by law are the heads of departments. The President has no more right to control or exercise the powers conferred by law upon them than they have to control him in the discharge of his duties. It is especially the custom of Congress to entrust to the secretary of the treasury specific powers over the currency, the public debt, and the collection of the revenue. If he violates or neglects his duty, he is subject to removal by the President or impeachment by the House of Representatives, but the President cannot exercise or control the discretion reposed by law in the secretary of the treasury or in any other head or subordinate of any department of the government. This limitation of the power of the President and distribution of power among the departments is an essential requisite of republican government, and is one that an army officer, accustomed to give or receive orders, finds it difficult to observe or to understand when elected President."[1]

But in another passage he gives this account of President Hayes and his Cabinet, of which body he was a member: "Neither interfered with the duties of another. The true rule was acted on that the head of each department should submit to the President his view of any important question that arose in his department. If the President wished the opinion of his Cabinet on any question he submitted it to the

[1] 1 Recollections, 449.

Cabinet, but took the responsibility of deciding it after hearing their opinions. It was the habit of each head of a department to present any question of general interest in his department, but as a rule he decided it with the approbation of the President."[1]

Chief Justice Marshall, speaking with reference to the relations of the Executive and judicial powers, thus stated the position of the heads of the departments: "By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion and is answerable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers who act by his authority and in conformity with his orders. In such cases their acts are his acts, and whatever opinion may be entertained of the manner in which the Executive discretion may be used, still there exists and can exist no power to control that discretion. When the heads of departments are the political or confidenial agents of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable."[2]

This indicates in a general way their relations with the President. As to their relations with the legislative power the Supreme Court said in a later case:

[1] 2 Recollections, 812.

[2] Marbury *v.* Madison, 1 Cranch, 137 (1807).

"The Executive power is vested in a President and as far as his powers are derived from the Constitution he is beyond the reach of any department except in the mode presented by the Constitution through the impeaching power. But it by no means follows that every officer in every branch of that department is under the exclusive direction of the President. Such a principle we apprehend is not, and certainly cannot, be claimed by the President. It would be an alarming doctrine that Congress cannot impose upon any executive officer any duty that it may think proper which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of the law, and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case when the duty enjoined is of a mere ministerial character." In the same case Chief Justice Taney said: "The office of postmaster-general was not created by the Constitution, nor its powers marked out by that instrument. The office was created by an act of Congress, and whenever Congress creates such an office as that of the postmaster-general, by law, it may unquestionably limit its powers and regulate its proceedings; and may subject it to any supervision or control, Executive or judicial, which the wisdom of the legislature may deem right."[1]

This decision of Justice Taney's was delivered within five years of Secretary Taney's execution of

[1] Kendall *v.* Stokes, 12 Peters, 524 (1838).

President Jackson's wishes in defiance of a resolution of the House, which, as Mr. Fairlie remarks,[1] demonstrated the authority of the President and established a precedent. A brief recital of this controversy will present concretely a clearer view of the principle involved. The charter of the Bank of the United States provided that "the deposits of the public money of the United States in places in which the said bank and branches thereof may be established shall be made in the said bank or branches thereof unless the secretary of the treasury shall at any time otherwise order and direct, in which case the secretary of the treasury shall immediately lay before Congress, if in session, and if not, immediately after the commencement of the next session, the reasons for such order or direction."[2] In September, 1833, President Jackson submitted a paper to his Cabinet setting forth at length the facts and reasons for a change of the deposits to take place on the first of the ensuing October. Among other things he referred to his own re-election after the veto in 1832 of the bill for the recharter of the bank as indicating popular approval of his policy. He said: "The

[1] See note, p. 232, above.

[2] It might happen that public money would be needed at some point where there was no branch bank. . . . The power had been used again and again for its proper purpose of depositing public money in the banks of smaller or frontier towns. Jackson conceived or had suggested to him a way in which it might be used to deal a stunning blow at the bank by a general and permanent order from the secretary to deposit all the revenue in other places than the bank or its branches. Winsor, Hist. of America, 7, 285.

President could not in justice to the responsibility which he owes to the country, refrain from pressing upon the secretary of the treasury his view of the considerations which impel immediate action. Upon him has been devolved by the Constitution and the support of the American people the duty of superintending the operation of the Executive departments of the government and seeing that the laws are faithfully executed. In the performance of the high trust it is his undoubted right to express to those whom the laws and his own choice have made his associates in the administration of the government, his opinion of their duties under circumstances as they arise."

A resolution of censure was offered in the Senate, December 26, 1833, which in a modified form was adopted, March 28, 1834. In his protest against this action, President Jackson referred to words contained in the resolution, as originally offered, which recited his "dismissing the late secretary of the treasury because he would not, contrary to his sense of his own duty, remove the money of the United States in deposit," etc., "in conformity with the President's opinion and appointing his successor to effect such removal." He said: "The whole Executive power being vested in the President, who is responsible for its exercise, it is a necessary consequence that he should have a right to employ agents of his own choice to aid him in the performance of his duties, and to discharge them when he is no longer willing to be responsible for their acts. It cannot be doubted that it was the legal duty of the secretary

of the treasury to order and direct the deposits of the public money to be made elsewhere than in the Bank of the United States whenever sufficient reasons existed for making the change. If in such a case he neglected or refused to act he would neglect or refuse to execute the law. What would be the sworn duty of the President? Could he say that the Constitution did not bind him to see that the law was faithfully executed because it was one of the secretaries instead of himself on whom the service was specifically imposed? Might he not be asked whether there was any limitation to his obligations prescribed by the Constitution? Whether he is not equally bound to take care that the laws be faithfully executed whether they impose duties on the highest officers of state or the lowest subordinate in any of the departments? Might he not be told that it was for the sole purpose of causing all executive officers from the highest to the lowest faithfully to perform the services required of them by law that the people of the United States have made him their chief magistrate and the Constitution has clothed him with the entire executive power of the government? The principles implied by these questions appear too plain to need elucidation. . . . It has already been mentioned (and it is not conceivable that the action of the Senate is based on any other principle) that the secretary of the treasury is the officer of Congress and independent of the President; that the President has no power to control him and consequently none to remove him. With the same propriety and on similar grounds may the secretary of state, the sec-

retaries of war and the navy, and the postmaster-general, each in succession, be declared independent of the President, the subordinates of Congress and removable only with the concurrence of the Senate. Followed to its consequences, this principle will be found effectually to destroy one co-ordinate branch of the government, to concentrate in the hands of the Senate the whole executive power and to leave the President as powerless as he would be useless, the shadow of authority after the substance has departed."

The question of the President's responsibility was again prominent in the dispute over the removal of Mr. Stanton, the secretary of war, by President Johnson, Stanton having become virtually secretary or minister of the Senate, as Ewing of Ohio wrote, "to annoy and obstruct the operations of the Executive."[1] In presenting to the Senate in December, 1867, the varied reasons for suspending Mr. Stanton, President Johnson thus stated the principle involved: "It was in Cabinet consultation over these bills (the Reconstruction acts and another) that a difference of opinion upon the most vital points was developed. Upon these questions there was perfect accord between all the members of my Cabinet and myself, except Mr. Stanton. He stood alone, and the difference of opinion could not be reconciled. That unity of opinion, which, upon great questions of public policy or administration, is so essential to the Executive,

[1] See Rhodes' History of the United States, Vol. VI, p. 104. See also the following pages for excellent account of Johnson's Impeachment Trial.

was gone. I do not claim that the head of a department should have no other opinions than those of the President. He has the same right in the conscientious discharge of duty, to entertain and express his opinions as has the President. What I do claim is that the President is the responsible head of the administration, and when the opinions of the head of a department are irreconcilably opposed to those of the President in grave matters of policy and administration, there is but one result which can solve the difficulty, and that is a severance of the official relation. This in the past history of the government has always been the rule, and it is a wise one, for such differences of opinions among its members must impair the efficiency of any administration."

There is a difference between Executive powers vested by the Constitution in the President and to be exercised by himself, in his discretion, or through the heads of departments, acting for him upon a principle of agency or delegation, and merely statutory Executive functions depending for their existence upon and regulated in their exercise by the legislation of Congress. As to the latter, the constitutional powers and discretion of the President in the conduct of foreign relations and as commander-in-chief of the army and navy, render the affairs of the Departments of State, War and Navy less subject to intimate legislative regulation than those of the Treasury or the Interior. In general, the supervisory powers of the President over the heads of departments are in some respects analogous to those of heads of departments over their subordinates. Thus the supervising pow-

ers of the secretary cannot enable him to change the duties vested in a subordinate by law, nor require them to be performed by another, nor substitute his own discretion for that of the officer in whom the law has placed it, subject to another direction of review under judicial process, nor for that of a subordinate officer when the judgment of the latter is by the statute governing the case declared to be final.

And there is a distinction between matters purely administrative or executive in their nature and those which are judicial or quasi-judicial. This may be illustrated by cases relating to patents, or proofs of settlement and improvement in the land office,[1] and the statutory finality, as to the Executive, of the settlements made by the accounting officers. It is plain that the President's power of supervision in such cases is no greater than that of the secretary. But it is the duty of both to take care that the laws be faithfully executed.

As common superior it may become the duty of the President to direct the heads of two or more departments in a matter of common concern. Thus President Lincoln gave directions as to the conduct of the navy, to be carried out by the secretary in such manner as to facilitate the action of the State Department in dealing with the complaints of neutral governments as to captures. President McKinley intervened for the purpose of securing proper co-operation between the army and navy at Santiago. It

[1] Butterworth *v.* Hoe, 112 U. S., 50 (1884); Lytle *v.* Arkansas, 9 Howard, 314 (1849); Orchard *v.* Alexander, 157 U. S., 372 (1894).

has been suggested that where the attorney-general and the head of a department differ as to advice given by the former the President may with propriety be called upon to intervene.

There is a difference between discretionary powers vested by statute in the head of a department involving grave matters of public policy and those which are exercised in particular cases, involving merely individual right. The discretion exercised by a secretary in making an allowance under a contract, is different from that which determined that a bridge over a navigable stream is an obstruction to navigation, and this in turn differs from that which directs the deposit of the public moneys of the United States. A question of fact and opinion always exists where discretion is involved. Discretion may be abused through corruption, favoritism, or mere incompetence, and in any of these cases the law is not faithfully executed. If the President and the officer in whom the discretion is vested differ, the substance and result are the same when the officer is removed, whether the act be styled an attempt by the President to usurp a discretion elsewhere vested by the law, or whether it be styled a faithful execution of the law by the removal of an unfit and the substitution of a proper agent.

Government is a practical affair and it has been said that it is the business of those who administer it to rule, and not to wrangle. That an agent should be forced upon the President, to exercise powers vested by the Constitution in the commander-in-chief is clearly inconsistent with the Constitution. And

Mr. Stanton himself was guilty of no such impropriety as intrusion upon a meeting of the Cabinet, after his refusal to resign had interrupted personal intercourse with the President. Had he remained, under efficient sanction of the legislative branch, the advocate of legislative policies against an impotent Executive veto, and, as head of a department enjoying larger executive powers; and had the other secretaries, instead of resigning, put themselves in like attitude, we should have found ourselves under a species of parliamentary system with a nominal Executive almost as powerless as the King of England or the President of the French Republic. With the repeal of the Tenure of Office Act in 1887, as observed above, there was restored the original interpretation of the President's unlimited power of removal. That power being now beyond question, the Cabinet, with the appointment of whose members the Senate never interferes except for grave reason, is distinctly a Presidential council for whose acts the President is responsible and not a parliamentary ministry whose advice the President must follow. It is indispensable that the official held responsible for the proper execution of the laws shall have the power of removal.

CHAPTER XVII

THE CIVIL SERVICE

The Constitution provides that the President shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors and other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not therein otherwise provided for, and which shall be established by law; but Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments. "The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session," and "shall commission all the officers of the United States."

This constitutional provision, with the statutory creations under it, has put the President in command of a hundred and fifty thousand subordinates with salaries aggregating $100,000,000.[1] Of these six thousand are appointed by the President by and with the advice and consent or the Senate, this number being fifteen times as many as there were in Jeffer-

[1] Woodburn, The American Republic, p. 183.

son's time, ten times as many as at the beginning of Jackson's administration and four times the number when Lincoln became President.[1]

In this class of appointments are included, of course, the more important officers, not only the heads of great departments, but also heads of bureaus and such officers as revenue collectors and postmasters. The President's power in these appointments is subject to the very potent restraint of the Senate. It was the clear intent of the Constitution that the Senate should have only the power of ratification, despite the implication of the right to participate in the initial selection to be found in the word "advice." And this clear intent is followed in respect of appointments to Cabinet positions, the Senate, under a custom with few exceptions, confirming without consultation or question the President's nominations. It is followed, too, generally, in appointments to the diplomatic service. But in the case of other important offices, the Senate, in observance of what is known as "senatorial courtesy," has come in the evolution of our political system to refuse to confirm a nomination opposed by a Senator from the state concerned. Moreover, this opposition is likely to develop unless the President accepts the senator's recommendation. The result of this practice and of the fact that it is impossible for the President to have personal knowledge of the multitude of applicants for the increasing number of offices, is that Congress has come to have a very considerable and often con-

[1] Fairlie, Michigan Law Review, Vol. II, p. 192.

trolling influence in the selection of the President's nominees, especially for the local federal offices. The extreme statement is made by Professor Woodburn that "the President has virtually surrendered the Executive power of appointment to members of the national legislature."[1] On the other hand, as pointed out by another high authority, the President's "exclusive power over the formal nominations tends to induce the members of Congress to support legislative measures forwarded by the administration."[2] There seems thus to have been brought about an exchange of function, to the extent that the President yields to the recommendations of congressmen and senators, under the need of advice and the compulsion of a "courtesy" which gives to one senator's objection the weight of the entire body, and to the degree on the other hand in which the legislative product is affected by the power of appointment politically employed.

Congress, which is distinctly inhibited, by exclusion, from vesting in itself the appointment of officers, except for its own organization, and from vesting it elsewhere than in the President, the courts of law, and the heads of departments, has from time to time made provision in apparent conflict with this constitutional prescription, sometimes in relation to employments not originally regarded as offices in the constitutional sense. Many such employments, with the growth of government, have been raised to the rank of "office." Again emergency appointments

[1] Woodburn's "The American Republic," p. 228.

[2] Fairlie's Michigan Law Review, Vol. II, p. 194.

have been sustained, as in the case of vice-consuls appointed by ministers abroad, under statutory authority, and such appointments under long practice and from the necessity of the case have been sustained as sufficient to constitute at least a *de facto* officer entitled to salary.[1]

Congress seemingly exceeded its authority in its frequent imposition of federal duties upon state officers, as in the fugitive slave law of 1793, the statutes as to the apprehension of deserting seamen, the naturalization and quarantine laws, and in other instances. It is held, however, that to increase the duties of an officer does not amount to an appointment.

The Constitution seems to contemplate that an appointment shall be made upon separate consideration of each case by the proper authority, but promotions in the army and navy are made under legislative rules relating to classes of officers. A distinction has been made here between original appointments to offices newly created and the filling of casual vacancies; the former are filled by selection, the latter may be filled by promotions according to seniority or other legislative rule. It is regarded as settled by the practice of the government that such provisions are within the authority conferred upon Congress to make rules for the government and regulation of the land and naval forces, so long as they are not incompatible with the proper exercise of the appointing power.

[1] U. S. *v.* Eaton, 169 U. S., 331 (1898).

Congress may prescribe qualifications and require that appointments be made out of a class of persons ascertained by proper tests to have those qualifications. This authority is limited by the necessity for leaving reasonable scope for the exercise of the judgment and will of the appointing power in making a selection, but to require the appointment to be determined by a competitive examination would be to exclude the right of choice from the appointing power, so it has been held,[1] and in effect give it to the examiners.

Methods of co-operation of legislative and Executive authority to promote the efficiency of the service are illustrated by measures of 1855 and 1857 relating to the navy. A board of naval officers was constituted by the act of 1855, to be assembled by order of the President, who were to scrutinize and examine the officers of the navy from the grade of captain down and report such as were incapable or incompetent, with recommendations pursuant to which, if approved by the President, the officers were to be dismissed or put upon a reserved list as on leave of absence or on furlough, and ineligible to promotion. Vacancies thus made were to be filled by promotion and appointment. The action of the board having been reported it was approved by the President *en bloc*, and dismissals and retirements having been made accordingly, Attorney-General Cushing sustained the proceedings and held: that the board was not required to proceed upon notice and hearing, nor

[1] 13 Atty. Gen. Op., 524.

required to summon witnesses or hold public sessions; that army precedents existed for similar boards proceeding in like manner and that similar proceedings were properly applicable to civil officers; that the substance of the transaction was the exercise of the President's constitutional power of dismissal upon his own final discretion; and that this fixed the status of the officers and made them incapable of restoration save by nomination and confirmation. The act of 1857 authorized a court of inquiry to examine the cases of such officers, as might desire it with a view to their restoration, such examination to include investigation of the "physical, mental, professional and moral fitness" of the officer, the court to be governed by the "laws and regulations which now govern courts of inquiry."[1] And this was held to include the regulations of the navy and the common-law military as received and practised in the army and navy and to require regular hearing and separate action, the effect of the decision being advisory merely.

Specific restraint is put upon the appointive power in the constitutional provisions that no senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created or the emoluments whereof shall have been increased during such time and that no person holding office under the United States shall be a member of either house during his continuance in office.

[1] 8 Atty. Gen. Op., 223, 336.

Governor Kirkwood's appointment as a member of the tariff commission provided for by the act of 1882 being under consideration in May of that year, it appeared that he had resigned as senator to become secretary of the interior and had resigned that office as well. He was held to be ineligible, his original term of senatorial election not having expired, and the case was said to be without recorded precedent.[1] A senator of the United States was nominated to a civil office the emoluments of which had been increased during his term, on February 23, 1895, and on the same day his nomination was confirmed by the Senate. His term as senator expired March 4, 1895, and on this day he took the oath of office under his appointment. His commission was signed by the President, March 5, 1895. The appointment was held to be a nullity.

There is no such prohibition of the merging of the judicial and Executive function in one person. Chief Justice Jay acted as minister to England. Chief Justice Marshall continued to act as secretary of state for a time after taking his seat on the bench; Justice Nelson of the Supreme Court acted as one of the British Court High Commission; and several of the justices sat upon the electoral commission of 1877.[2] The statutes forbid extra allowances or compensation to officers but do not forbid the holding of more than one office by the same person; and com-

[1] 17 Atty. Gen. op., 365.

[2] In 1813, the Senate declined confirmation of Mr. Gallatin as a peace commissioner, because he was secretary of the treasury. 7 Winsor, Hist. of America, 483.

pensation for two or more compatible offices occupied by the same person is held to be proper.[1]

As to procedure: Nominations pending before the Senate are considered as subject to withdrawal either by the President who made them or his successor. A nomination of A, vice B, removed, is a usual form. It indicates that the confirmation and appointment of A will so operate, but such a nomination merely does not have that effect. The rejection by the Senate of a recess appointee does not terminate his temporary commission. Notwithstanding confirmation the President in his discretion may withhold and frequently has withheld, a commission. When a commission is signed, sealed and deposited in the Department of State the appointee's title to the office is vested, and no delivery of the commission is required to perfect it. The subsequent death of the President, by whom nothing remains to be done, has no effect upon the completed commission. The principle that commissions granted by the king expire with his demise does not obtain in this country. And in the case of subordinate officers their appointees hold not at the pleasure of the individual but of the officer and continue, in case of a vacancy in the principal office, until it is filled.

An appointee under an act of Congress which does not define the tenure of the office, holds during pleasure. Unless the statute is express the rule is that appointments are to be made by and with the advice and consent of the Senate; and the President

[1] U. S. *v.* Converse, 21 How., 463 (1858).

appoints in all cases unless express provision in conformity with the constitution is made for appointment by other authority.

An office is a public station or employment conferred by appointment of government. The term embraces the idea of tenure, duration, emolument, and duties; and the latter are prescribed by law and not by contract. The Constitution makes two classes of officers: the one requiring the concurrence of the Senate to their appointment and the other not. Hence, in the constitutional sense, an officer of the United States is one who has been appointed by one of the methods prescribed by the Constitution. But this is not the exclusive sense of the word "officer" and in the construction of statutes the term has been given a wider meaning. A merchant appraiser who performs a temporary function in the customs service is, however, not an officer, nor is an examining surgeon who acts for the Pension Bureau in the examination of pensioners and applicants for pension.

Office is not a contract relation; the officer does not hold by contract but by the will of the sovereign power. Office and rank in the military service are distinguishable. The rank of the officer is usually indicated by the title of the office, but he may have a different rank conferred upon him as a title of distinction. Thus Thomas J. Wood, a colonel of regular cavalry, having been commissioned a major-general of volunteers, was retired, as a regular officer, according to his rank of command. Rank may be fixed by relation back to a date prior to commission to give the appointee the dignity intended, and lost

rank may be restored as where promotion has been deferred pending a court-martial or overlooked at the proper time for making it, and so in case of restoration after a wrongful dismissal.

The general rule is that an office must be established by law, but it may be established by the tacit recognition of Congress. And the power to appoint diplomatic agents of any rank determined upon by him is a constitutional function of the President, not derived from nor limitable by Congress, but requiring only the concurrence of the Senate. The early practice of the government was in full conformity with this principle and appropriations were made of a gross sum for the expenses of diplomatic intercourse with fixed limits of allowances. Since 1818 the practice has been to provide for certain ministers at specified places. Consular officers are governed by the same constitutional provision. The act of 1893 gave the President express authority to accord diplomatic representatives rank corresponding to the rank of the representative of the foreign country who was received or about to be received.

No precise determination has ever been made as to who may be those inferior officers whose appointments may be assigned to the President alone or to the heads of departments. The courts appoint their own clerks and reporters and the heads of departments are generally entitled to the appointment of the clerks in their respective offices. The statute is looked to in each case to ascertain whether the advice and consent of the Senate is required, as no other test has been furnished. By heads of departments

in the constitutional provision is intended the heads of the great departments the establishment of which was in contemplation. The power cannot be conferred upon the heads of bureaus or other subordinate officers of those departments. As to such inferior officers Congress may prescribe their tenure of office and limit and restrict the power of removal. In this respect these officers are distinguished from those appointed by the President by and with the advice and consent of the Senate, as to whom the court refrained from expressing an opinion.[1]

From the organization of the government under the Constitution to the commencement of the recent war for the suppression of the rebellion, the power of the President, in the absence of statutory regulations, to dismiss from the service an officer of the army or navy was not questioned by any adjudicated case or by any department of the government.[2] The act of 1866 provided that no officer in the military or naval service should, in time of peace, be dismissed from the service, except upon and in pursuance of a sentence of a court-martial to that effect, or in commutation thereof. There was no purpose by this act to withdraw from the President the power, with the advice and consent of the Senate, to supersede an officer in the military or naval service by the appointment of someone in his place. "If the powers of the President and Senate in this regard could be constitutionally subjected to restrictions by statute (as to which we express no opinion) it is sufficient for

[1] U. S. *v.* Perkins, 116 U. S., 483 (1886).

[2] Blake *v.* U. S., 227 (1880).

the present case to say that Congress did not intend by that section to impose them."[1]

In this connection the recent decision of the District Federal Court in the "Brownsville Case" while not strictly pertinent, will be of interest. The only statutory regulation provides: that "no discharge shall be given to any enlisted man before his term of service has expired except by order of the President, the secretary of war, the commanding officer of a Department, or by sentence of court-martial." The power to grant discharges here conferred was held to imply the power to impose them "unless a soldier have some rights inherent in his contract or inferable from the nature of his occupation." No such inherent rights of contract were found to exist, and the military compact is distinguished from the civil in that the former "may be dissolved at any moment by the supreme authority of government." And the government in this case speaks through the President.

Territorial courts are not constitutional courts in which the judicial power conferred by the Constitution upon the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make rules concerning the territory belonging to the United States. The tenure of territorial judges is governed by statute and they are subject to removal by the President.[2] The dissenting judges thought the

[1] Blake *v.* U. S., 103 U. S., 227 (1880).
[2] McAllister *v.* U. S., 141 U. S., 175 (1890).

statutory term of office of four years should govern and that the principle of judicial independence should preclude an arbitrary power of removal.

Various important offices were given a four years' tenure by the act of 1820, subject to removal, at pleasure, and the act was carried into the revision of 1874 without this qualification in view of the general provisions of the Tenure of Office Act. On the repeal of the latter it was held to have been the intention of Congress to restore the former power of removal as it existed prior to 1867, and that the given term of four years was to be construed as a provision of limitation of duration and not of grant, and therefore the officers were not entitled to hold it against the President's power of removal.[1] Some of the remarks in the opinion of the court in this case may be construed as intimating an opinion that the validity of the Tenure of Office Act was doubted by the court.

The provision as to recess vacancies has been a subject of frequent Executive and judicial examination. A recess means the interval between the adjournment of one session of Congress and the meeting of another. The holiday intermission of the Senate is not such a recess. A vacancy happens whenever it is found to exist, whether the office has ever been filled or not. It happens if the Senate adjourns without acting on a pending nomination or after the rejection of a nomination and before another nomination has been made, or where a va-

[1] Parsons *v.* U. S., 167 U. S., 324 (1897).

cancy happened during the session but was not filled, or where it existed before and during the session of the Senate. But where an office is created and is not filled during the same session nor during the following recess, and the next session is passed without a nomination, a temporary appointment in the following recess is unauthorized.[1]

The judicial authority is without jurisdiction to compel appointment to, or restrain removal from office or to restore after removal.[2] Nowhere in the statutory provisions relating to the civil service "is there anything to indicate that the duty of passing in the first instance upon the qualifications of applicants, or later, upon the competency or efficiency of those who have been tested in the service, was taken away from the administrative officers and vested in the courts. Indeed it may well be doubted whether that is a duty which is strictly judicial in its nature."[3] The Civil Service Act of 1883 makes no provision as to removals, except that in the thirteenth section, which prohibits any promotion, degradation or removal or discharge of any officer or employee for giving or withholding or neglecting to make political contributions. The Executive rules in force prior to November 2, 1896, in no way undertook to regulate removals and they were constantly made down to the promulgation of the amended rules of November 2, 1896, and those of July 27,

[1] 4 Atty. Gen. op., 361. Schenck *v.* Perry Fed. Cases, 12451 (1869).

[2] White *v.* Berry, 171 U. S., 366 (1898).

[3] Keim *v.* U. S., 177 U. S., 290 (1900).

1897. By paragraph 3 of rule 2, of the Civil Service Rules promulgated by President Cleveland, November 2, 1896, it was provided "that no person in the Executive civil service should dismiss or cause to be dismissed or make any attempt to procure the dismissal of or in any manner change the official rank or compensation of any other person therein because of his political or religious opinions or affiliations." This rule was amended by President McKinley, July 27, 1897, by adding these words: "No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of department or other appointing officer, of which the accused shall have notice and an opportunity to make defence." These civil service rules, so far as they deal with the Executive right of removal, are but expressions of the will of the President and are regulations imposed by him on his own action and that of heads of departments appointed by him. He can enforce them by requiring obedience to them on penalty of removal. But they do not give the employees in the classified service any such tenure of office as to confer upon them a property right in their office or place, and hence equity has no jurisdiction in case of removals.[1]

Mandamus will not lie in a state court to compel the performance of official duty by a federal officer. Whether regarded as the officer or as the private agent of the government he can only be controlled by the power that created him.[2] Federal officers

[1] Morgan *v.* Nunn, 84 Fed. Rep., 550 (1898).

[2] McClung *v.* Silliman, 6 Wheat., 598 (1821).

who are discharging their duties in a state in the internal management of a federal institution are not subject to the jurisdiction of the state in regard to matters of administration conducted under the approval of Congress and are not subject to arrest or other liability under the laws of the state for acts so done, as for furnishing oleomargarine to the inmates of the institution contrary to provisions of the legislative rules of the state relating to that article.[1] And it is competent for Congress to provide for the removal of the causes, for trial, to the courts of the United States, where prosecutions are brought against federal officers for acts done under the authority of the United States, as, for instance, the case of a deputy collector of internal revenues, who was indicted in a state court for murder where the homicide was committed in alleged self-defence by the officer while engaged in seizing an illicit distillery.[2] And an officer or other person held in custody under state process for an act done or omitted in pursuance of a law of the United States may be released by *habeas corpus* from a federal court. The jurisdiction in such cases is exercised with discretion and under the expectation that in general the party will receive no prejudice in the state court. As a rule he will be left to his ultimate remedies unless there appear to be an immediate cause for intervention. The deputy marshal who killed Judge Terry in defence of Justice Field of the Supreme Court was released by *habeas corpus* from prosecution on the

[1] Ohio *v.* Thomas, 173 U. S., 276 (1899).

[2] Tennessee *v.* Davis, 100 U. S., 257 (1879).

charge of murder in the courts of California, as the deputy marshal was justified under the law, his official duty, and the facts of the case.[1] In a message to the Senate in 1890, President Harrison justified the landing of an armed force at Cedar Keys, Florida, for the protection of the collector of customs from mob violence. He held it to be his duty to "use the adequate powers vested in the Executive to make it safe and feasible to hold and exercise the offices established by the Federal Constitution and laws" and that it was not necessary to depend upon the local authorities especially where unfriendly, or incompetent to preserve the peace.

The general doctrine is that a public officer sued for a tort or misfeasance in the discharge of his duty, must defend himself, and if he has acted legally that gives him a perfect defence to the action. It is not admitted as a general principle that whenever an officer of the United States is tried for an alleged illegal act done under color of his office, the Executive shall interfere on his behalf and conduct his defence. Nor is there any established usage on the subject. In many cases it has been deemed to be for the public interest that the officer should be defended by the United States, as where the general peace and security or the relations of the United States among themselves or to the Federal Government or the relations of the United States with foreign governments are involved. And Congress has frequently reimbursed officers for the expenses of

[1] *In re* Neagle, 135 U. S., 1 (1890).

successful defence, and indemnified them in other cases where damages have been recovered.

Th official conduct of officers is subject to regulation by Congress, and has been regulated by various provisions made from time to time from the foundation of the government. Certain officers have been disabled from engaging in trade or commerce, or from owning sea vessels, or purchasing public lands, or dealing in public securities, or acting as agent in the prosecution of claims against the United States, or soliciting political contributions, or being interested in government contracts, or giving gifts to or receiving gifts from official supervisors. Such power in Congress was never questioned until 1882, when it was affirmed.[1]

Where the orders of an official superior are unauthorized by law and are beyond his jurisdiction, they cannot change the nature of a transaction or legalize an act which without those instructions would have been a plain trespass and therefore furnish no defence to an inferior who was the actual agent in committing the wrong.[2] It is the law which gives the justification and nothing less can give irresponsibility to the officer although he may be acting in good faith under the instructions of his superior. But no liability arises from an error of judgment in the exercise of a discretionary authority within the limits of lawful jurisdiction. But an honest mistake in judgment will not excuse, where a plain ministerial duty has been neglected or refused. The

[1] *Ex parte* Curtis, 106 U. S., 371 (1882).

[2] Little *v.* Barreme, 2 Cranch, 170 (1804).

same principle which protects the superior officer from the consequences of mistaken judgment when acting within the scope of his authority protects the subordinate who acts under him. The justification of military or other necessity for the invasion of the private right of the citizen must be made to appear as a matter of fact. "It is the emergency which gives the right and the emergency must be shown to exist before the taking can be justified. In deciding upon the necessity, however, the state of the facts, as they appeared to the officer at the time, must govern the decision."[1]

Official communications made by a head of departments when made in the discharge of duties imposed upon him by law, are privileged on grounds of public policy. If he acts, having authority, his conduct cannot be made the foundation of a civil suit against him, "even if the circumstances show that he was not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. In the present case the defendant in issuing the circular in question did not exceed his authority nor pass the line of his duty as postmaster-general. The motive which impelled him to do that of which the plaintiff complains is therefore immaterial."[2]

Heads of departments, in the exercise of a sound discretion, may decline to furnish communications or papers in their custody in response to legal process; they would be justified in representing to the

[1] Mitchell *v.* Harmoning, 13 How., 115 (1851).

[2] Spalding *v.* Vilas, 162 U. S., 483 (1890).

court that upon public considerations they declined to furnish them. "The administration of justice is only part of the conduct of the affairs of any state or nation, and is, with respect to the production or non-production of papers from the files of an Executive department, subject to the general welfare of the community."[1] And Executive regulations prescribing rules as to the production or non-production of such documents have been sustained.[2]

[1] Devens, 15 Atty. Gen. Op., 415.

[2] Boske *v.* Comingore, 177 U. S., 459 (1899).

CHAPTER XVIII

WAR

Congress has the power not only to raise and support and govern armies, but to declare war. It has therefore the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature and by the principles of our institutions. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President in war more than in peace intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President.[1]

The Constitution does not specify the powers which he may rightfully exercise in his character as commander-in-chief nor are they defined by legislation. And in deciding what he may rightfully do under this power, when there is no legislative dec-

[1] Chase, C. J., *Ex parte* Milligan, 4 Wall, 139 (1866).

laration, the President is guided wholly by his own judgment and discretion, subject to his responsibility under the Constitution. When Congress has exerted its power by declaring war against a foreign country, it is the duty of the President to prosecute it. The manner of conducting it is not defined by the Constitution, but the thing itself was well understood by its framers. They intended that in prosecuting it by land and sea all the rights and powers that other civilized nations at war possessed should be exercised. The President has all the powers of personal command. He may conduct the war by issuing orders for battles, blockades, sieges, captures, military occupations, contributions and such appropriation or destruction of enemies' property in enemies' country, as may be justified by lawful war. The conduct of war is in its nature an Executive power, and is vested in the President in the fullest extent save as qualified by the legislative powers vested in Congress. It has the power of originating war by declaration, and of provoking it by issuing letters of marque and reprisal, of raising and supporting armies, maintaining a navy, employing the militia, providing for calling them forth, of making rules for the government of all armed forces, and for the disposition of captures by land or water. And the powers of the President are limited also by the laws of war; he cannot lawfully transcend the rules of warfare established among civilized nations nor authorize proceedings which the civilized world condemns.

The President is a department of the government, and although the only department which consists of

a single man, he is charged with a greater range and variety of powers than any other department. He is a civil magistrate and not a military chieftain, and in this respect we see a striking proof of the generality of the sentiment prevailing in this country at the time of the formation of our government to the effect that the military ought to be held in strict subordination to the civil power. To call, as is sometimes done, the judiciary the civil power and the President the military power is at once a mistake of fact and an abuse of language.[1] And the secretaries of war and the navy are civil officers; the secretary of war, "although the head of the War Department, is not in the military service, but on the contrary is a civil officer, with civil duties to perform, as much so as the head of any other of the Executive departments."[2]

Martial law is not directly mentioned in the Constitution of the United States, but that instrument recognizes the law of nations and contemplates the existence of war, invasion, insurrection, rebellion, domestic violence and the employment of military force for the execution of the laws of the Union, and thus, by implication, that application of the laws of war, of which martial law is a part, and which necessarily comes into effective operation when the civil powers fail. The Constitution also declares that the privilege of the writ of *habeas corpus* shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it. And this sus-

[1] Bates, 10 Atty. Gen. op., 79.

[2] U. S. *v.* Burns, 12 Wall, 246 (1870).

pension, not in itself a declaration of martial law, is thus provided for as an incident, and a usual and important incident, of such a declaration.

The exercise of martial law in the United States, under federal authority, has not involved direct challenge of the Executive power to proclaim it, or recognize or act under the conditions which originate it. There has been general recognition, executive, judicial, legislative, and popular, of the necessity and legality of that form of paramount military rules. The questions which have arisen have related to the incidents and limitations of that authority, as whether the power to suspend the writ of *habeas corpus* is legislative or executive, as to the jurisdiction of military tribunals over civilians in places where the civil courts are open and in the regular exercise of their functions, the right to make arrests without judicial process, the effect of bills of indemnity, the exercise of judicial functions in places where the military jurisdiction is operative and in control, or, over persons in military custody, and as to legal responsibility, civil or criminal, for acts done by military authority in alleged violation of rights to life, liberty or property. Martial rule is exercised under the direction of the President in conformity with the usages of war and the necessities of the case, and the officer in command is usually presumed to act under his authority. Martial rule is not dictatorship; the military jurisdiction is limited, and unnecessary regulation of or interference with the civil rights of the citizen is mere usurpation. This distinction was clearly pointed out by President Lin-

coln in his notable action upon the measures taken by Generals Fremont and Hunter and in his correspondence with Generals Butler and Hurlbut.[1]

President Fillmore expressed the opinion that Congress was without power to limit the power of the President over the army and navy in the execution of the laws, but by the act of 1878 it was provided that it shall not be lawful to employ the army of the United States or any part thereof as a *posse comitatus* or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of such force may be expressly authorized by the Constitution or by act of Congress. This express authority is given by various statutes and for various purposes; one of them covers the case of the protection of the state against domestic violence; another, and the most general one of them, relates to unlawful obstructions, combinations or assemblies or rebellion against the authority of the United States, when it shall be impracticable in the judgment of the President to enforce the laws of the United States by the ordinary course of judicial proceedings. In such cases he may call forth militia or employ the army and navy, and in so proceeding, he first, by proclamation, commands the insurgents to disperse within a limited time. With some modifications this express authority has existed since 1792.

Insurrection against government may or may not culminate in organized rebellion, and it may or may

[1] 4 Nicolay & Hay, 416, 421; 9 *Ibid.*, 447, 443.

not assume such aggressive proportions as to be justly denominated territorial war; but when the party in rebellion hold and occupy certain portions of the territory of the rightful sovereign, and have declared their independence, cast off their allegiance, and have founded a new government, organized armies and raised supplies to support it, and to oppose and if possible to destroy the government from which they have separated, the law of nations recognizes them, upon certain formal conditions, to be belligerents and engaged in lawful war. The incidents of territorial civil war, are, in international law, the same as those of a public war between foreign nations, so far as relates to belligerency, both as between the hostile parties and as effecting neutrals, but the sovereignty assailed may lawfully assert and enforce sovereign as well as belligerent rights, and thus punish as crimes acts, which, if done by aliens in lawful war, would have been innocent. And so, in enforcing belligerent rights, it may effect seizures and confiscations against enemies, though subjects, without regard to personal guilt, or to those rights of procedure usually available in favor of defendants.

The act of February 28, 1795, authorized the President of the United States to call forth the militia, whenever the laws of the United States should be opposed or the execution thereof obstructed in any state by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshals; to suppress such combinations and to cause the laws to be duly

executed; and the act of March 3, 1807, authorized the employment of land and naval forces of the United States for the same purpose. These acts being in force, President Lincoln, April 15, 1861, issued a proclamation declaring the laws of the United States to be opposed and the execution thereof obstructed in the states of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana and Texas, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshals by law. Militia were therefore called forth, and the persons composing the combinations were commanded to disperse. Congress was convened for extraordinary session on July 4 following. April 19, 1861, a blockade of the ports of the states named was proclaimed; April 27, 1861, the ports of Virginia and North Carolina were added. In May and June following the proclamation of blockade, captures were made by the navy of neutral vessels for violation of blockade and of vessels owned in the insurrectionary states as enemy property. Hearings were had in the prize courts before the passage of the act of August 6, 1861, legalizing and making valid all acts, proceedings and orders of the President as if they had been issued and done under the previous express authority of the Congress of the United States. Appeals to the Supreme Court were taken in some of these cases, which were heard together under the name of Prize Cases[1] in 1862. Notable opinions were delivered below by

[1] Prize Cases, 2 Black, 635 (1862).

Judge Sprague at Boston, Judge Betts at New York, Judge Cadwalader at Philadelphia and Judge Dunlop at Washington. By substantially the same course of reasoning all reached the conclusion that the President had the power, in the absence of legislative authority, to recognize the existence of a defensive war, and to exercise, upon his own discretion, the belligerent right of blockade, with the effect of establishing the status of civil war, with its incidents and consequences as to insurgents and neutrals. The precedents relating to the power of the President to exercise belligerent rights in the absence of action by Congress, which occurred in the Mexican war, in the establishment of custom houses at Tampico and San Francisco, under military occupation, in the organization of military governments in California and New Mexico, and in the continuance of those governments after the treaty of peace, and until action by Congress, were referred to as showing the power of the President, and it was inferred that blockade was within the same principle as a recognized mode of application of warlike force.

By a universally recognized principle of public law, commercial intercourse between states at war is interdicted and it needs no special declaration on the part of the sovereign to effect this result, for it follows from the very nature of war that trading between the belligerents should cease. But the rigidity of the rule can be relaxed by the sovereign and the laws of war so far suspended as to permit a limited trade with the enemy. In England the power to remit the restrictions on commercial inter-

course with a hostile nation is exercised by the Crown. Military and naval commanders exercised the power to license trade with the enemy in California during the Mexican War, as a matter of military policy and necessity, under the authority of the commander-in-chief. Congress acted early in the Civil War upon this subject and conferred a wide discretion upon the President to license, and upon the secretary of the treasury to regulate, trade with the enemy. "The Executive power and the command of the military and naval forces is vested in the President. Whether in the absence of congressional action, the power of permitting partial intercourse with a public enemy may or may not be exercised by the President alone, who is constitutionally invested with the entire charge of hostile operations, it is now unnecessary to decide, although it would seem that little doubt could be raised on the subject. . . . Whatever view may be taken as to the precise boundary between the legislative and executive powers in reference to the question under consideration, there is no doubt that a concurrence of both powers affords ample foundation for any regulations on the subject."[1] The war power vested in the government implies all this without any specific mention of it in the Constitution.[2]

War gives to the sovereign the full right to take the persons and confiscate the property of the enemy wherever found, but the declaration of war does not operate to vest the property of the enemy in the

[1] Hamilton *v.* Dillin, 21 Wall, 73 (1874).
[2] *Ibid.*

government so as to support judicial proceedings for its seizure when found on land within its territory. The universal practice of forbearing to seize debts and credits, and the principle that the right to them survives the restoration of peace, prove that war is not an absolute confiscation of this property. Modern usage does not sanction the seizure of the goods of an enemy on land within the territory, which was acquired in peace in the course of trade; and the power to make rules concerning captures on land and water, vested in Congress by the Constitution, included such property. In the absence of an act of Congress, it is not competent for the Executive to seize, or for the courts to condemn such property as by the modern usage is not subject to confiscation in the absence of an expression of the sovereign will.[1]

The effect of the military occupation of territory depends upon the laws of war, and these are alike operative whether a part of the territory of the United States is occupied by troops of a hostile nation, or whether troops of the United States are in hostile possession of the territory of a foreign country, or occupy by military force the whole or part of the territory of a state in the Union which is in insurrection, or territory conquered from a hostile power and temporarily held for the purpose of enabling its inhabitants to establish a government of their own. Illustrations of the foregoing are the British occupation of Castine in Maine, in the War

[1] Brown *v.* U. S., 8 Cranch, 110 (1814).

of 1812; the occupation by the forces of the United States of Tampico, Mexico, and of California and New Mexico during the Mexican War; the military occupations in Tennessee, at New Orleans and elsewhere during the Civil War; the occupation of the Philippines, Porto Rico and Cuba during and after the war with Spain.

In all such cases the Executive military authority is exercised according to the laws of war, and when at the close of the war the occupied territory is ceded by treaty the Executive authority continues until Congress acts and organizes a civil government. The Executive power exerted through or under the military authority extends to the enforcement of civil order among the inhabitants, the exercise of powers of police and taxation and the exercise of judicial power by military or provisional courts, with jurisdiction both civil and criminal, original and appellate.

Thus it was said: "Although the city of New Orleans was conquered and taken possession of in a civil war, waged on the part of the United States to put down an insurrection and restore the supremacy of the National Government in the Confederate states, that government had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. In such cases the conquering power has a right to displace the pre-existing authority, and to assume, to such extent as it may deem proper, the exercise of all the powers and functions of government. It may appoint all

the necessary officers, and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exercised in such cases, save those which are found in the rules and usages of war."[1]

President Lincoln by executive order on October 20, 1862, established a provisional court in Louisiana. The order recited the necessity for the administration of justice consequent upon the temporary sweeping away by the insurrection of the civil authorities of the state, including the judicial authority of the Union; appointed a judge, gave jurisdiction of all cases, civil and criminal, including law equity, revenue and admiralty; conformed the rules of procedure to those of the state and federal courts; made the judges' decisions final and conclusive; authorized the establishment of rules of procedure, and the appointment by the judge of a prosecuting attorney, marshal and clerk. "These appointments are to continue during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans nor the restoration of the civil authority in that city and the state of Louisiana. A copy of this order, certified by the secretary of war, and delivered to the judge, shall be deemed and held to be a sufficient commission. Let the seal of the United States be hereunto

[1] New Orleans *v.* Steamship Co., 20 Wall, 387 (1874).

affixed." This court survived until provision was made by Congress, pursuant to which its functions ceased July 28, 1866; and its proceedings were valid.[1] The provisional government including the judicial system established in New Mexico by General Kearney during military occupation in the war with Mexico was sustained upon similar principles.[2] And similarly the civil jurisdiction over civilians of the provost court established at New Orleans by General Butler immediately upon the occupation of that city, under the presumed authority of the commander-in-chief.[3] All such courts are executive courts, established under the executive powers granted by the Constitution. They exercise no part of the judicial power granted by that instrument and vested thereby in the Supreme Court and in such inferior courts as Congress shall from time to time establish. But prize courts can only be established as depositaries of the judicial power; and as such must derive their judicial authority from the Constitution and laws of the United States. And neither the President nor any military officer can establish such a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, or to administer the law of nations.[4] Hence the military governor of California, though acting under the sanction of the

[1] The Grapeshot, 9 Wall, 129 (1869). Burke *v.* Mitenberger, 20 Wall, 519 (1873).

[2] Leitensdorfer *v.* Webb, 19 How., 176 (1857).

[3] Mechanics' Bank *v.* Union Bank, 20 Wall, 278 (1874).

[4] Jecker *v.* Montgomery, 13 How., 498 (1851).

President, could not confer prize jurisdiction upon a chaplain of the navy, who acted also as alcalde of Monterey, and his judgment in a prize case was a nullity.[1]

The Executive power in military occupation of Cuba after the treaty of peace with Spain, and pending the establishment of an independent civil government in that island, was sustained and explained by the Supreme Court.[2]

[1] *Ibid.*

[2] Neely v. Henkel, 180 U. S., 109 (1901).

CHAPTER XIX

TREATIES AND FOREIGN RELATIONS

THE President has power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; but he is himself the medium of all intercourse, communication and negotiation between the United States and other governments. By him are all foreign ministers nominated and, with the approval of the Senate, appointed, and by him are all treaties initiated. While Congress can alone declare war, the President may so conduct intercourse with other nations as to make the declaration necessary.

President Washington, regarding the Senate as a true Executive council in the matter of treaties, consulted in person with the Senate, and deputed General Knox and Mr. Jay to meet the Senate for the purpose of personally explaining and giving information in such matters, but this method proved to be inconvenient and impracticable. In a special message, in 1830, on negotiations with the Choctaw Indians, President Jackson submitted certain questions in advance for the advice of the Senate, stating that in doing so he had departed from a long, and, for many years, an unbroken usage. President Polk in 1846 submitted to the Senate a proposal for the ad-

justment of the Oregon boundary. He referred to the practice of President Washington in asking the previous advice of the Senate and thought it a good one. The Senate "are a branch of the war-making power, and it may be eminently proper for the Executive to take their advice in advance upon any great question which may involve in its decision the issue of peace or war." He stated his intention to conform to the advice of a constitutional majority of the Senate. "Should the Senate, however," he continued, "decline by such constitutional majority to give such advice, or to express an opinion on the subject, I shall consider it my duty to reject the offer reported in the negotiations." The Senate, on June 12, 1846, advised the acceptance of the proposal and on June 16 the treaty was laid before them for ratification. President Buchanan in 1861 in like manner submitted certain questions as to the San Juan boundary, and, these being under consideration when President Lincoln was inaugurated, he in turn requested the advice of the Senate upon them.

Presidents have gone even farther and have asked Congress for the means of carrying out the terms of a treaty if successfully negotiated. President John Adams in a message to both Houses requested an appropriation in advance of negotiations with the Cherokees. President Jefferson requested a provisional appropriation of $2,000,000 pending the negotiation for Louisiana, to be "considered as conveying the sanction of Congress to the acquisition proposed." Congress appropriated $3,000,000 in response to the request of President Polk "to enable the President

to conclude a treaty'' with Mexico, and President Buchanan attempted to secure an appropriation to enable him to effect a negotiation for the purchase of the Island of Cuba. After the rejection of his treaty for the acquisition of San Domingo, President Grant, by message, suggested that action be taken for that purpose by joint resolution.

This procedure, however, is not the rule of practice, though it is customary that the chairman of the Committee on Foreign Affairs be kept advised of the progress of negotiations. President McKinley went so far as to make the chairman of this committee a member of the commission to conclude the Treaty of Paris.

The Senate construes ''advice and consent'' differently from the ''advice and consent'' necessary to the appointment of a Presidential officer in that it holds itself competent to make amendments to a treaty instead of ratifying it and yet its power under like specific grant in the matter of appointments is not interpreted to extend to the suggestion or substitution by amendment of other names or persons, who would be agreeable in the stead of those nominated by the President. Of course amendments adopted by the Senate have no validity. They simply indicate the character of treaty that would be acceptable. The Senate may request the President to open negotiations looking to a treaty or it may advise against beginning negotiation, but, again, their recommendations carry no compulsion.

Explanation of proposed treaties, elaborate arguments in favor of their ratification, and proposed

amendments to pending treaties have been presented through executive messages to the Senate, and generally the most precise formalities have been observed in order to their most perfect and complete ratification and effect. An exceptional instance is the treaty with Spain. Upon its concurrence, the Senate on February 14, 1899, resolved,—

"That by the ratification of the treaty with Spain it is not intended to incorporate the inhabitants of the Philippine Islands into citizenship of the United States, nor is it intended permanently to annex said islands as an integral part of the territory of the United States, but it is the intention of the United States to establish on said islands a government suited to the wants and civilization of the inhabitants of said islands to prepare them for local self-government, and in due time to make such disposition of said islands as will best promote the interests of the United States and the inhabitants of said islands."

This was presented in the form of a joint resolution, but was not acted upon by the House of Representatives. It was not adopted by two-thirds of a quorum of the Senate. In passing upon its effect the Supreme Court said: "The case would not essentially be different if this resolution had been adopted by a unanimous vote of the Senate. To be efficacious, such resolution must be considered either as an amendment to the treaty or as a legislative act qualifying or modifying the treaty. It is neither."[1]

Treaties have been withdrawn by the President

[1] Fourteen Diamond Rings *v.* U. S., 183 U. S., 176 (1901).

pending their consideration by the Senate; thus President Arthur in 1885 recalled a treaty with Belgium; President Cleveland withdrew for examination, March 13, 1885, treaties submitted by his predecessor with Dominica, Spain and Nicaragua, and likewise, on March 9, 1893, the pending treaty with the Provisional Government of the Hawaiian Islands.

President Washington in a message to the House of Representatives in 1796 set forth in forcible terms the complete obligation of a treaty as a law of the land, independently of any contemplated action by appropriation or otherwise to carry it into complete execution. The House has not acquiesced in this view, but while it has never refused to give due effect to a treaty, has made continual claim to the right to exercise a discretion where an appropriation is necessary to give the treaty full effect. The weight of opinion seems to support this claim. It had early expression in a letter of Jefferson's and judicial support in the opinion of Justice McLean of the Supreme Court: "A treaty is the supreme law of the land only when the treaty-making power can carry it into effect. A treaty which stipulates for the payment of money undertakes to do that which the treaty-making power cannot do; therefore the treaty is not the supreme law of the land. . . . No act of any part of the government can be held to be a law which has not all the sanction to make it law."

Whether a treaty may not honorably be abrogated without the consent of both parties to it is a question to which most, if not all, nations have given an affirmative answer. There may be justifying reasons in

some instances, but the same moral condemnation should follow a breach of treaty for purely selfish reasons as falls upon individuals who break contracts. President Arthur vetoed a bill in 1882 to restrict Chinese immigration because it violated the national faith with China, and President Hayes took similar ground in a veto message in 1879, in which he discussed at length the obligation of treaties. He said the history of the government showed no instance of an abrogation of a treaty except in the act of 1798, the preamble of which recited just cause and which declares: That the United States are of right freed and exonerated from the stipulations of the treaties and of the consular conventions heretofore concluded between the United States and France, and that the same shall not henceforth be regarded as legally obligatory on the government or citizens of the United States.

In the conduct of ordinary business much of it is transacted upon informal understandings or agreements, not formulated and set forth in solemn written contracts. And so it is in the affairs of nations, not every understanding requires a formal treaty; such agreements, made by authority of the President, are known as "Executive agreements," many precedents of which exist, coming down from an early day.[1]

Legislative authority exists for Executive agreements upon various subjects, one of the most important of which is that of postal conventions.

[1] Reinsch, Legislatures and Legislative Methods, 99–102, Am. State Series.

"From the foundation of the government to the present day, the Constitution has been interpreted to mean that the power vested in the President with the concurrence of two-thirds of the Senate, does not exclude the power of Congress to vest in the postmaster-general the power to conclude conventions with foreign governments for the cheaper and more convenient carriage of foreign mails."[1]

In administering our foreign relations the Executive is guided by the law of nations, unless Congress shall have furnished a different rule, but an act of Congress will not be considered as intending a conflict with a rule of international law, if the act be open to a different construction. Where the law of nations fails to furnish the rule, neither the courts nor the Executive can supply one. Resort must be had to the legislative power.

The prize courts of the United States are independent of the Executive. The decisions of these courts, and those of other courts in matters purely internal and municipal, may give rise to diplomatic remonstrances or reclamations which are met by the Executive in a spirit of equity and comity not necessarily limited by the doctrines of the courts; but if judicial proceedings can be resorted to or are pending, Executive action is generally deferred until after judicial remedies are exhausted through a recourse to the highest court.

The general duty of the Executive in the execution of the laws extends to the protection of the rights of

[1] 19 Atty. Gen. op., 513 (1890).

aliens, usually limited to the execution of the laws of Congress; but sometimes the attention of the state authorities is solicited and the district attorney may be instructed to render assistance as an advocate in special cases. The United States has assumed the duty of making reparation where foreign subjects have been injured through the failure of the state authorities to afford them the due protection of their laws.

"The United States, in taking the rank of a nation must take with it the obligation to respect the rights of other nations. This obligation becomes one of the laws of the country to the enforcement of which the President, charged by his office with the execution of all of our laws, and charged in a particular manner with the superintendence of our intercourse with foreign nations, is bound to look, and when wrong is done to a foreign government, invasive of its sovereignty, and necessary to our peace, to rectify the injury so far as it can be done by a disavowal and the restoration of things to the *status quo*."[1] Property in the custody of executive officers by seizure or capture may be restored, and where judicial proceedings are pending, instituted by private parties and affecting our international relations, the Executive may intervene by a suggestion setting forth the facts so that the action of the court may conform to the actual condition of affairs as thus disclosed.

The Executive attends to the national duty of hospitality as to foreign vessels of war and exercises a discretion as to permitting the passage of foreign troops through our territory.

[1] Wirt, 1 Atty. Gen. op., 566.

Executive authority through the exercise of the treaty power and supported by the legislation of Congress has established a system of consular courts, particularly in Mohammedan and pagan countries. In these courts the requirements of the federal Bill of Rights relating to judicial procedure are inapplicable.[1]

The international extradition of fugitives from justice as an Executive function has been generally regarded as depending for its authority upon treaty or statute law. The trial of a surrendered fugitive can only be upon the charge under which he was delivered. The judicial authority usually follows the Executive construction of an extradition treaty. And final executive action is upon consideration of the whole case in view of the political consequences involved. The surrender of the accused does not necessarily follow a judicial finding under which he has been held. The international extradition of fugitives from justice is not a function of the several states.

The Monroe Doctrine is a notable example of the effect of the mere Executive declaration of Executive policy upon the international relations of the United States. Lacking any legal sanction whatever, it has come to be recognized as of such controlling importance as to be compared in effect with a principle of the unwritten constitution of Great Britain, and is with difficulty to be distinguished from an admitted rule of international law.

The act of 1794, which has been generally recog-

[1] *In re* Ross, 140 U. S.. 453 (1890).

nized as the first instance of municipal legislation in support of the obligations of neutrality and a remarkable advance in the development of international law, was recommended to Congress by President Washington in his annual address on December 3, 1793; was drawn by Hamilton and was passed by the Senate, the deciding vote being cast by Vice-President Adams.[1] "The act of 1794, as amended in 1818 and later, and carried under the title 'Neutrality' in the Revised Statutes, has been the starting point in an extensive chapter as well in the judicial as in the Executive affairs of the United States. In proclaiming and adhering to the doctrines of neutrality and non-intervention the United States have not followed the lead of other nations; they have taken the lead themselves and have been followed by others. This was admitted by one of the most eminent of modern British statesmen who said in Parliament while a minister of the Crown 'that if he wished for a guide in a system of neutrality he would take that laid down in America in the days of Washington and the secretaryship of Jefferson.'"[2] In 1819 the American neutrality act of 1818 was substantially re-enacted by Parliament.

As to the recognition of belligerency in civil conflicts in foreign states there is a continuous and consistent line of precedents, determining Executive policy in such cases. These were thoroughly reviewed by President Grant and again by President McKinley, as applied to the case of Cuba. And the same remark

[1] The Three Friends, 166 U. S. (1896).

[2] President Fillmore, Mess., Dec. 2 (1851).

applies to the Executive policy as to the recognition of a country as independent. In either case it is generally admitted that recognition is a matter depending upon Executive discretion. There are legislative precedents of resolutions that recognition ought to be made. The two houses acting separately passed such resolutions as to Texas. After explaining his inaction President Jackson said: "In the preamble of the resolution of the House of Representatives it is distinctly intimated that the expediency of recognizing the independence of Texas should be left to the decision of Congress. In this view, on the ground of expediency, I am disposed to concur, and do not therefore express any opinion as to the strict constitutional rights of the Executive either apart from or in conjunction with the Senate over the subject. It will always be considered consistent with the spirit of the Constitution and most safe that it should be exercised, when probably leading to war, with a previous understanding with that body by whom alone war can be declared and by whom all the provisions for sustaining its perils must be furnished."[1] The joint resolution of April 20, 1898, "that the people of the Island of Cuba are and of right ought to be free and independent," did not amount to a recognition of the existence of any such government as the Republic of Cuba.[2]

It is to the President "that the citizens abroad must look for protection of person and property and for the faithful execution of the laws existing and in-

[1] Message, Dec. 21 (1836).

[2] Neely *v.* Henkel, 180 U. S., 109 (1901).

tended for their protection. For this purpose the whole Executive power of the country is placed in his hands under the Constitution. As it respects the interposition of the Executive abroad for the protection of the lives and property of the citizen the duty must of necessity rest in the discretion of the President." The question is one of a political nature and the order of the President in such cases justifies the subordinate. Acts of lawless violence may be repelled by force. "Under our system of government the citizen abroad is as much entitled to protection as the citizen at home. The great object of government is the protection of the lives, liberty and property of the people composing it, whether abroad or at home, and any government failing in the accomplishment of the object or the performance of the duty is not worth preserving."[1]

The general rule is that the Executive power to employ force is confined to measures of resistance, protection or defence. The use of aggressive force is war-like and must depend upon legislative authority. This authority has been given in anticipation in particular instances and President Buchanan repeatedly but vainly urged upon Congress the propriety of conferring upon the Executive a general discretion to employ force in support of diplomatic demands so that American citizens may have the "same protection under the flag of their country, which the subjects of other nations enjoy." Indian hostilities have never depended upon a prior declaration of war

[1] Nelson J. Durand *v.* Hollins, Fed. Cas., No. 4186 (1860).

by Congress, and the President may establish the legal status of war, without such declaration, by using defensively those means and measures which under the law of nations are employed in lawful war.

CHAPTER XX

EXECUTIVE DEPARTMENTS

In the earlier chapters xiv–xv, there have been defined the general scope of the Federal Executive, the relation of the President to the heads of Administrative Departments and the methods of appointment and dismissal of civil servants. It is the purpose of this chapter to describe in brief the executive machinery and the detail of its varied purpose.

As has been noted above, there were established immediately upon the inception of the Federal Government the Departments of State, War and the Treasury. But there were in effect five departments, since the postoffice was established in 1789 and the office of attorney-general was created in the same year, though the Postoffice Department and the Department of Justice were not formally recognized as Executive Departments until the early seventies.

The Department of State, created by the Act of July 27, 1879, as the Department of Foreign Affairs, and changed in name later in the same year—September 15—to that of the Department of State, was originally vested, under the direction of the President, with jurisdiction over foreign, diplomatic and consular affairs. To these was added in 1793 jurisdiction in the granting of patents for useful inventions; it

was also charged for a time with the superintendence of the census enumeration. But these latter duties have passed to the jurisdiction of other departments, as will be noted later.

Originally, this department took form and scope from the Department of Foreign Affairs existent under the Confederation. But, as the change of name imports, the department was soon given wider scope, a proposal to erect a Home Department distinct from that of foreign affairs being defeated.

The definition[1] of the duties of the Secretary of State indicate the scope and nature of the duties that fall to this department. He is charged, under the direction of the President, with the duties appertaining to correspondence with foreign ministers, with the consuls of the United States and with the representatives of foreign powers accredited to the United States; and to negotiations of whatever character relating to the foreign affairs of the United States. He is also the medium of correspondence between the President and the chief executives of the several states of the United States; he has the custody of the great seal of the United States; and he countersigns and affixes this seal to all executive proclamations, to various commissions and to warrants for the extradition of fugitives from justice. He is also the custodian of the treaties made with foreign states and of the laws of the United States. He grants and issues passports; and exequaturs to foreign consuls in the United States are issued through his office. He publishes the

[1] This, and definitions later in this chapter, are taken largely from the "Official Congressional Directory," 1908.

laws and resolutions of Congress, amendments to the Constitution and proclamations declaring the admission of new states into the Union.

The work of the department aside from that which falls to the assistant secretaries and certain clerks is apportioned among the following bureaus, whose names are indicative of their function: Diplomatic, Consular, Indexes and Archives, Accounts, Rolls and Library, Appointments, Citizenship, Trade Relations and Far Eastern Affairs.

The Secretary of State is regarded as first in rank among the members of the Cabinet and under the Act of 1886 succeeds to the Presidency in event of the death of both President and vice-president.

The department whose secretary takes rank next to the Secretary of State is the Treasury Department. It was the third, however, to be established, September 2, 1789. It was originally vested with the jurisdiction over the financial and fiscal affairs of the Government, with the collection and expenditure of the public revenue and with jurisdiction over the sale of public lands. Of this last named function it was, however, relieved in 1849, when the Department of the Interior was organized.

The Secretary of the Treasury is charged by law with the management of the national finances. It is to be noted that the creating act does not include the modifying clause "under the direction of the President"—yet this omission does not give different status to the Secretary of the Treasury or his department. He prepares plans for the improvement of the revenue and for the support of the public credit; superin-

tends the collection of the revenue, and directs the forms of keeping and rendering public accounts and of making returns; grants warrants for all moneys drawn from the Treasury in pursuance of appropriations made by law and for the payment of moneys into the Treasury; and annually submits to Congress estimates of the probable revenues and disbursements of the Government. He also controls the construction of public buildings; the coinage and printing of money, the administration of the life-saving, revenue-cutter, and the public health and marine hospital branches of the public service, and furnishes generally such information as may be required by either branch of Congress on all matters pertaining to these. There are three Assistant Secretaries of the Treasury, to whom are assigned the general direction and supervision of the various divisions and offices of the department. There are besides these: the Controller of the Treasury, who prescribes the form of keeping and rendering all public accounts save those relating to postal revenues; auditors for the departments of the Treasury, War, Postoffice, Interior and Navy, and for the State and other Departments; a Treasurer of the United States, who is charged with the disbursement of all public moneys that may be deposited in the Treasury at Washington and in the Sub-Treasuries and in the National Bank United States depositaries; who is the agent for the redemption of National bank notes, trustee for bonds held to secure National Bank circulation and public deposits in National Banks, custodian of miscellaneous trust funds, fiscal agent for paying interest on the

public debt, and for paying the land purchase bonds of the Philippine Islands, special disbursing officer for the school fund of the Indian Territory and for the Philippine Islands' tariff fund, and agent and commissioner in other and minor interests; a Register of the Treasury, who signs and issues all bonds of the United States and who performs other duties suggested by the name Register; the Controller of the Currency, who has, under the direction of the Secretary of the Treasury, supervision of National Banks, their organization, the preparation and issue of National Bank circulation, the examination and consolidation of the reports of National Banks, and the redemption and destruction of notes used by National Banks; the Director of the Mint, who has general supervision of all the mints and assay offices of the United States; the Commissioner of Internal Revenue, who has general supervision of the collection of all internal revenue taxes, the enforcement of internal revenue laws, the employment of agents, etc.; the Surgeon-General of the Public Health and Marine Hospital service, who has supervision of marine hospitals and other relief stations of the service, the care of sick and disabled seamen taken from merchant vessels of the United States and from vessels in public service, the distribution of supplies to medical officers, the making of tests for pilot licenses, the forming of regulations for the prevention of the introduction and spread of contagious diseases and the conduct of the quarantine service of the United States;[1] the Bureau of Engraving and printing; and

[1] This officer is authorized to call conferences at least once

the General Superintendent of the Life-Saving Service.

The third department is that of War, established second in point of time, August 7, 1789. Originally, it had jurisdiction under the direction of the President over both military and naval affairs, over land grants for military services and over Indian affairs. In 1798 its jurisdiction over naval affairs was transferred to the Navy Department, created in that year. Its jurisdiction over land grants was transferred to the Treasury Department soon after its establishment, and its jurisdiction over Indian affairs was transferred to the Interior Department in 1849. During the period 1833–1849 it also had jurisdiction in the matter of military pensions, and it still retains the Record and Pension Office.

The Secretary of War "performs such duties as are required of him by law or may be enjoined upon him by the President concerning the military service." The duties devolved by law upon him are: the supervision of all estimates of appropriations for the expenses of the Department, including the military establishment, of all purchase of army supplies, of all expenditures for the support, transportation and maintenance of the army, and of such expenditures of a civil nature as may be placed by Con-

a year of state and territorial boards of health, quarantine authorities and state health officers for the purpose of considering matters pertaining to the public health. He is charged with the direction of a laboratory for the investigation of contagious and infectious diseases and the control of an experiment station for the study of leprosy.

gress under his direction. He has also supervision of the United States Military Academy at West Point and of military education in the army, of the Board of Ordnance and Fortification, of the various battlefield commissions, and of the publication of the official records of the War of the Rebellion. Furthermore, he has charge of all matters relating to national defence and seacoast fortifications; army ordnance, river and harbor improvements, the prevention of obstruction to navigation, the establishment of harbor lines and all plans and locations of bridges authorized by Congress to be constructed over the navigable waters of the United States require his approval. There is an Assistant Secretary of War, to whom is assigned specifically some of the duties embraced under the general charge of the Secretary of War. He is vested with authority to decide all cases which do not involve questions of policy, the establishment or reversal of precedents, or matters of special or extraordinary importance. There is in this department what is known as the General Staff Corps, organized under an Act of February 14, 1903, whose principal duties are: to prepare plans for the national defence and for the mobilization of military forces in time of war; to investigate and report upon all questions affecting the efficiency of the army and its state of preparation for military operations; to render professional aid and assistance to the Secretary of War and to general officers and other superior commanders, and to act as their agents in informing and co-ordinating the action of all the different officers who are subject to the supervision of the

Chief of Staff; and to perform such other military duties not otherwise assigned by law as may be from time to time presented by the President. The Chief of Staff, under the direction of the President, or of the Secretary of War under the direction of the President, has supervision of all troops of the line, of the Adjutant-General's department in matters pertaining to the command, discipline, or administration of the existing military establishment and of the Inspector General's, Judge Advocate General's, Quartermaster's Subsistence, Medical, Pay and Ordnance Departments', the Corps of Engineers, and the Signal Corps and performs such other military duties not otherwise assigned by law as may be assigned by the President. For purposes of administration, his office constitutes a supervising military bureau of the War Department. Duties formerly prescribed by statute for the Commanding General of the Army, as a member of the Board of Ordnance and Fortification and of the Board of Commissioners of the Soldiers' Home, are performed by the Chief of Staff or some other officer designated by the President. There are embraced within the Department several military bureaus, whose chiefs are officers of the Regular Army of the United States: the Military Secretary, the Inspector General, the Quartermaster General, the Commissary General of Subsistence, the Surgeon General, the Paymaster General, the Chief of Engineers, the Chief of Ordnance, the Judge Advocate General, the Chief Signal Officer, and, lastly, the Chief of the Bureau of Insular Affairs, to whom is assigned, under the immediate direction of the Secretary of War, all

matters pertaining to civil government in the island possessions of the United States subject to the jurisdiction of the War Department. To this chief is also assigned the transaction of all business in this country in relation to the temporary administration of the Republic of Cuba. In 1902 there was created within this Department a Board of Engineers for Rivers and Harbors to which are referred for consideration and recommendation all reports upon examinations and surveys provided by Congress and all projects and changes in projects for river or harbor improvement upon which report is desired by the Chief of Engineers, U. S. A. It is also made its duty to report through the Chief of Engineers upon the advisability of undertaking certain improvements at the expense of the United States.

The Department whose head ranks next in the Cabinet is the Department of Justice. The Attorney-General, who is the head of this Department and the chief law officer of the Government represents the United States in matters involving legal questions; he gives his advice and opinion when they are required by the President or by the heads of other executive departments on questions of law arising in the administration of their respective departments; he appears in the Supreme Court of the United States in cases of special gravity and importance; he exercises a general superintendence and direction over United States attorneys and marshals in judicial districts in the states and territories; and he provides special counsel for the United States whenever required by any department of the Government. He has the assistance

of the Solicitor-General, of the Assistant to the Attorney-General, of Assistant Attorneys-General, of special solicitors for several of the departments, of a superintendent in charge of prisons, of an attorney in charge of pardons and of other and minor officers.

The Postoffice Department was not organized as one of the executive departments until June 8, 1872, but a postoffice with a postmaster-general was created in 1789 and given jurisdiction over the postal affairs of the Government. In 1792 a general postoffice was established, and finally in 1872 the department was created, with jurisdiction over all the postal affairs of the Government. The Postmaster-General has the direction and management of this department; he appoints all officers and employees of the department, except the four assistant postmasters-general and the purchasing agent, who are appointed by the President, by and with the advice and consent of the Senate. He appoints also all postmasters whose compensation does not exceed one thousand dollars. He makes postal treaties with foreign governments, by and with the advice and consent of the President; he awards and executes contracts, and directs the management of the foreign and domestic mail service. The First Assistant Postmaster-General has to do with the preparation of cases for the appointment of postmasters, with recording their appointments, supervising their bonding, considering charges and complaints, regulating hours of service, re-adjusting salaries and making allowances for clerk hire, etc., with fixing the sites of Presidential postoffices, and the establishment and discontinuance of fourth-class post-

offices, and of postal stations, and with the supervision of the establishment and extension of city free delivery service. The Second Assistant Postmaster-general has charge of the railway mail service, foreign mails, railway adjustments, contracts, the inspection and equipment. The Third Assistant Postmaster-general has charge of the divisions of finance, stamps, money orders, registered mails, classification of mail matter and redemption of stamped paper. The Fourth with rural free delivery, supplies, dead-letters, and the making, printing and distribution of post route maps.

The next department—that of the Navy—as has been noted above, was once included in the War Department. It was created into a separate department, April 30, 1798. The Secretary of this Department has the general superintendence of the construction, manning, armament, equipment and employment of vessels of war. At one time the Department had jurisdiction in the matter of naval pensions, but this was transferred to the Department of the Interior in 1849. The Department embraces the following Bureaus: Navigation, Yards and Docks, Equipment, Ordnance, Construction and Repair, Steam Engineering, Medicine and Surgery, Supplies and Accounts. There is an Assistant Secretary of the Navy, and a Judge Advocate General who has to do with the proceedings of all court martials, courts of inquiry, and who considers and reports upon all matters which may be referred to him regarding questions of law, regulation and discipline requiring the Department's action. There is also a Commandant

of the Marine Corps, who is responsible to the Secretary of the Navy for the general efficiency and discipline of the Corps and has charge of the recruiting service.

The next department is that of the Interior, established by Act of March 3, 1849. Under its jurisdiction have been gathered many matters that once were included under the jurisdiction of other departments; most of these have been noted above. But new functions have also been added. The variety of its interests and activities is intimated by a catalogue of the duties of the Secretary of the Interior. He is charged with the supervision of public business relating to patents for inventions, pensions and bounty lands, the public lands and surveys, the Indians, education, the Geological Survey and Reclamation Service, the Hot Springs reservation, the Yellowstone National Park and other national parks, with the distribution of appropriations for agricultural and mechanical colleges in the states and territories, with the custody and distribution of certain public documents, and supervision of certain hospitals and eleemosynary institutions in the District of Columbia. He also exercises certain powers and duties in relation to the territories of the United States.

There are two Assistant Secretaries; there is a Commissioner of Patents who is charged with the administration of the Patent Laws and the supervision of all matters relating to the issue of letters patent and the registration of trade-marks, prints and labels; he is by statute made the tribunal of last resort in the Patent Office, and has appellate jurisdiction in the

trial of interference cases, of the patentability of inventions and the registration of trade-marks.[1] There is within this Department also a Commissioner of Pensions, who supervises the examination and adjudications of claims arising under laws passed by Congress granting bounty land or pension on account of service in the Army or Navy during the Revolutionary War, and also subsequent wars in which the United States has been engaged. There is a Commissioner of the Land Office, who is charged with the survey, management and sale of the public domain and the issuance of titles therefor; a Commissioner of Indian Affairs, who has charge of the Indian tribes of the United States—exclusive of Alaska—their lands, schools, purchase of supplies, and general welfare; a Commissioner of Education, whose duties are to collect the statistics showing the condition and progress of education in the several states and territories, and to diffuse such information respecting the organization and management of schools and school systems and methods of teaching as shall aid the people of the United States in the establishment and maintenance of efficient school systems, and otherwise promote the cause of education throughout the country. He is also charged with the education of natives in Alaska and the administration of the endowment fund for the support of colleges for the benefit of agriculture and the mechanic arts. There is the Director of the Geological Survey, who has charge of the classification of public lands, the ex-

[1] Appeals lie from his decisions to the U. S. Court of Appeals, D. C.

amination of the geological structure, mineral resources and products of the National domain, and the survey of forest reserves, including the preparation of topographic and geologic maps; also the measurement of streams and determination of the water supply of the United States, including the investigation of underground waters and artesian wells. And finally the Director of the Reclamation Service, who had charge of the reclamation of arid lands including the engineering operations to be carried on by the use of the reclamation fund created by the Act of June 17, 1902, from proceeds of sales of public lands.

This Department had originally jurisdiction over the census and the accounts of the officers of the United States courts and over public buildings. The last named was abolished in 1867, the second was transferred to the attorney-general in 1870 and the first to the Department of Commerce and Labor in 1903.

In 1862 the Department of Agriculture was created, with a Commissioner of Agriculture at its head. This became an Executive Department with a Secretary of Agriculture at its head, by the Act of February 9, 1889. This Department has jurisdiction of an advisory character over the agricultural affairs of the country. The Secretary of this Department appoints all the officers and employees of the Department, with the exception of the Assistant Secretary and the Chief of the Weather Bureau, who are appointed by the President, and he directs the management of all the divisions, officers and bureaus embraced in the Department. He is in an advisory relation to the

agricultural experiment stations deriving support from the National Treasury; he has control of the quarantine stations for imported cattle, of interstate quarantine rendered necessary by sheep and cattle diseases, and of the inspection of cattle-carrying vessels, and directs the inspection of domestic meats and all imported food products. He has also to do with the execution of laws prohibiting the transportation by interstate commerce of game killed in violation of local laws, and of excluding from importation certain noxious animals, and has authority to control the importation of other animals. Under the direction of this Secretary, the Chief of the Weather Bureau has charge of the forecasting of weather, the issue of storm warnings, the display of weather and flood signals for the benefit of agriculture and navigation, the gauging and reporting of rivers, the maintenance and operation of seacoast telegraph lines and the collection and transmission of marine intelligence for the benefit of commerce and navigation, the reporting of temperature and rainfall conditions for the cotton interest, the display of frost and cold wave signals, the distribution of meteorological information in the interest of agriculture and commerce, and the taking of such meteorological observations as may be necessary to establish and record the climatic conditions of the United States. There is maintained in this Department a Bureau of Animal Industry, which conducts the inspection of animals, meats and meat food products generally, supervises the export and import, and the interstate movement of animals, makes examination of the existence of dangerous

communicable diseases of live stock, superintends the measures for their control and eradication, and conducts original scientific investigations as to the nature and prevention of such diseases and reports on the means of improving the animal industry of the country. It further makes investigations concerning the breeding and feeding of animals, and, in regard to dairy subjects, inspects and surveys dairy products for export and supervises the manufacture and interstate commerce of butter. There is also a Bureau of Chemistry, which makes such investigations and analyses as pertain in general to the interests of agriculture, dealing with fertilizers and agricultural products. It is this bureau which investigates the composition and adulteration of foods and the composition of field products in relation to their nutritive value and to the constituents which they derive from the soil, fertilizers and air, and which examines foods and drugs for the purpose of determining whether such articles are adulterated or misbranded. This latter function is exercised under the recent Act of June 30, 1906. Under this law the Bureau also inspects foreign food products and excludes from entrance those injurious to health or which are falsely branded or labeled, as well as food products exported to foreign countries where physical and chemical tests are required. Then there is the Bureau of Statistics, which collects information in regard to a multitude of matters relating to agricultural production, distribution and consumption, and studies the foreign markets and the conditions of demand and supply. The Office of Experiment Stations represents the De-

partment in its relations to agricultural colleges and experiment stations in the various states and territories, and directly manages the experiment stations in Alaska, Hawaii and Porto Rico. Its general object is the promotion of the interests of agricultural investigation and education throughout the United States; it publishes accounts of agricultural investigations, undertakes lines of inquiry through the various experiment stations, aids in the conduct of experiment stations, and in general furnishes them with such advice and assistance as will best promote the purposes for which they are established. It also gives aid to farmers' institutes and agricultural schools in making their organizations more effective, and is charged with investigations as to the nutritive value and economy of human foods and as to irrigation and drainage and other phases of agricultural engineering. The Bureau of Entomology obtains and disseminates information regarding injurious insects affecting field crops, fruits, forest products and stored products, studies insects in relation to the diseases of man and other animals, experiments with the introduction of beneficial insects, and conducts experiments and tests with insecticides and insecticide machinery. It is charged further with investigations in apiculture and sericulture. The Bureau of Biological Survey studies the geographical distribution of animals and plants, investigates the economic relations of birds and mammals, recommends measures for the preservation of beneficial and the destruction of injurious species, and is charged with the execution of provisions of the Federal laws for the importation

and protection of birds. Of recent establishment is the Forest Service, charged with the administration of the National forest reserves. It gives advice as to the proper handling of forest lands and as to methods of utilizing forest products. It investigates kinds of trees for planting and methods of culture, and conducts operations in forest planting on important reserves. Besides seeking to increase the commercial value of trees and testing the strength and durability of timbers and seeking methods of increasing their durability through seasoning and preservative treatment, it investigates the control and prevention of forest fires and other forest problems. The Bureau of Plant Industry studies plant life in all its relations to agriculture, investigating the diseases of plants and means of their prevention, studying the improvement of crops by breeding and selection, maintaining demonstration farms and carrying on investigations with a view to introducing better farm methods. It conducts agricultural explorations in foreign countries for the purpose of securing new plants and seeds for introduction into the United States; it studies fruits, their adaptability to various climates and the methods of harvesting, handling, storing and marketing them; it studies the adaptability of tropical and sub-tropical plants to the newly acquired territories of the United States; it has charge of the purchase and distribution of seeds, studying the adaptability of seeds to the various regions and investigating their purity and vitality, and it maintains tea gardens with a view to the production of tea. It carries on investigations

relative to drug plants and plants that are poisonous to stock. Its work is supplemented by that of the Bureau of Soils, which has for its object the investigation of soils and their relation to the crops, the investigation, mapping and reclamation of alkali lands and other like surveys. Finally, there is the Office of Public Roads, which collects information in regard to systems of road management, furnishes expert advice as to methods of road construction, making tests of road-making material in various states. All this manifold activity is in further illustration of the tendency set forth in the chapter on *Boards and Commissions* in Part One.

But the most important and recent illustration is to be found in the erection of the Department of Commerce and Labor under the Act of February 14, 1903. This Department has also gathered into itself something of the work of other departments, but a large part of its service is of recent authorization, and imports an enlargement of Governmental activities. The Secretary of this Department is charged with the work of promoting the commerce of the United States in its mining, manufacturing, fishing and labor interests. His duties also comprise the investigation of the organization and management of corporations—excepting railroads engaged in interstate commerce—the gathering and publication of information regarding labor interests and labor controversies in this and other countries, the administration of the Lighthouse Service and the aid and protection of shipping thereby; the taking of the census and the collection and publication of statisti-

cal information; the making of coast geodetic surveys, the collecting of statistics relating to foreign and domestic commerce, the inspection of steamboats and the enforcement of laws relating thereto for the protection of life and property; the supervision of the fisheries as undertaken by the Federal Government, the supervision and control of the Alaskan fisheries, the jurisdiction of merchant vessels, their registry, etc.; the supervision of the immigration of aliens and the enforcement of laws relating thereto and to the exclusion of the Chinese; the custody, construction, maintenance and application of standards of weights and measurements, and the gathering and supplying of information regarding industries and markets for the fostering of manufacturing. It is the further duty of the head of this Department to make such special investigations and furnish such information to the President or Congress as may be required by them on special matters embraced within the scope of the Department.

The important Bureaus in the Department are: the Bureau of Corporations, which is authorized, under the direction of the secretary, to investigate the organization, conduct and management of the business of any corporation, joint stock company or corporate company, engaged in interstate or foreign commerce, except as noted above, common carriers subject to the Interstate Commerce Act, to gather information and data for the President concerning interstate and foreign commerce; the Bureau of Manufactures, whose function it is to foster, promote and develop the various manufacturing industries in the

United States and markets for the same at home and abroad, by gathering and publishing all available and useful information concerning such industries and markets; including the compilation of such information from consular and other reports made to the Department of State; the Bureau of Labor, which is charged with the duty of acquiring and diffusing useful information on subjects in connection with labor, and especially upon its relations to capital, the hours for labor, the earnings for laboring men and women, and the means of promoting their material, social, intellectual and moral prosperity, especially to investigate the causes and facts relating to all controversies and disputes between employers and employees as they may occur and which may happen to interfere with the welfare of the people in the various states and to perform such minor duties, as the publication of a bulletin and the collection and publication of statistical details relating to all departments of labor in the territory of Hawaii; the Bureau of the Census, which is charged with the duty of taking the periodical censuses of the United States, of collecting such special statistics as are required by Congress (a service performed successively by the Departments of State, the Interior and Commerce and Labor); the Coast and Geodetic Survey, which as the name imports, is charged with the survey of coasts of the United States and the coasts under the jurisdiction thereof, and the publication of charts covering these; together with tide tables, directions covering navigable waters and current information to mariners; the Bureau of Statistics, which

collects and publishes the statistics of our foreign commerce and also information in regard to the leading commercial movements in our internal commerce and the publication of information in regard to the tariffs of foreign countries; the Bureau of Fisheries whose work comprises the propagation of useful food fishes and their distribution to suitable waters, inquiry into the causes of decrease of food fishes in lakes and other waters of the United States, the study of waters in the interest of fish culture, the investigation of fishing grounds with a view of determining their food resources and the development of commercial fisheries, and finally the collection and compilation of the statistics of fisheries and the study of their methods and relations; the Bureau of Navigation which is charged with the general superintendence of the commercial marine and merchant seamen of the United States, except so far as supervision is lodged with other officers of the Government, of the registers, enrollments and licenses of vessels, etc.; the Bureau of Immigration and Naturalization which is charged with the jurisdiction of the laws relating to immigation, of the Chinese exclusion laws and the naturalization laws; the Steamboat Inspection Service which is charged with the duty of inspecting steam vessels, the licensing of the officers of vessels and the administration of laws relating to such vessels and their officers for the protection of life and property; and, finally the Bureau of Standards, whose functions comprise the custody of the standards and their construction when necessary, the comparison of the standards used in scientific investigations, engineer-

ing, manufacture, commerce and educational institutions, with the standards adopted or recognized by the Government; the testing and calibration of standard measuring apparatus, the solution of problems which arise in connection with standards, and the determination of physical constants and properties of materials when such data are of great importance and are not to be obtained with sufficient accuracy elsewhere. This Bureau is authorized to exercise its functions not only for the Government of the United States but for any state or municipal government within the United States, or for any scientific society, educational institution, firm or corporation or individual within the United States engaged in pursuits requiring the use of standards or standard measuring instruments. A fee is charged for all such tests or investigations, except those performed for the Government of the United States or state government.

Beside these departments there are two important commissions—the Civil Service Commission and the Interstate Commerce Commission. The object of the first is "to regulate and improve the Civil Service of the United States"; it consists of three commissioners, not more than two of whom shall be adherents of the same political party, whose duty it shall be to aid the President as he may request in preparing suitable rules for carrying the Act of Congress with respect to the Civil Service into effect. The Act under which this Commission was created, provides, among other rules, for open examinations for testing the fitness of applicants for the classified service,

the making of appointments from among those passing the highest test, an apportionment of appointments in the departments at Washington among the states and territories, a period of probation before absolute appointment, and the prohibition of the use of official authority to coerce the political action of any person or body. Solicitation of contributions to be used for political purposes from persons in the service is forbidden. There are about 337,000 positions in the Executive Civil Service, of which 196,918 are classified, subject either to competitive examination under the Civil Service rules or to a merit system governing appointments at the Navy Yards.

The other commission is the Interstate Commerce Commission, created under an Act of February 4, 1887, and subsequently amended in 1889, 1891, 1895, 1903 and 1906. It is composed of seven members. The statutes under which it acts apply to all common carriers engaged in the transportation of oil and other commodities, except water and except natural or artificial gas, by means of pipe lines or partly by pipe line and partly by rail or by water, and to common carriers engaged in the transportation of passengers or property wholly or partly by railroad, and generally to any interstate traffic, including import and domestic, and also that which is carried wholly within any territory of the United States. The Commission has jurisdiction on complaint and after full hearing to determine and prescribe reasonable rates, regulations and practices and order reparation to injured shippers, to require any carriers to cease and desist from unjust discrimination or undue or un-

reasonable preferences, and to carry on proceedings for the enforcement of the law. The Commission may also inquire into the management of the business of all common carriers, subject to the provisions of the regulating statutes, and it may prescribe the accounts, records and memoranda which shall be kept by carriers and from time to time inspect the same.

The duties and powers of this Commission lead us out to the present frontier of the territory of the Federal Executive as the numerous State Boards and Commissions have in an earlier chapter carried us out to the present boundaries of State executive prerogative. In this frontier field the Executive takes on some functions that seem on the one hand to partake of the legislative and on the other of the judicial. It is in consideration of these functions and of what grows from them that in the next chapter we come to the logical end of this book.

CHAPTER XXI.

OTHER EXECUTIVE AGENCIES.

It is a universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred.

The only other questions which can arise between an individual claiming a right under the act done, and the public or any person denying its validity, are as to power in the officer and fraud in the party. All, save these, are settled by the decision made, or the act done, by the tribunal or officer, whether executive, legislative, judicial or special, unless an appeal is provided for or some other revision by an appellate or supervisory tribunal prescribed by law.[1]

This far-reaching principle embraces and sustains the wide range of governmental activities, agencies and acts relating to a great variety of matters and touching the rights and interests of the individual citizen in many ways; the principle stated may be said to be the doctrine of finality, and it is related to

[1] U. S. *v.* California Land Co., 148 U. S., 31, 1893.

another principle quite as general, sometimes called the *functus officio* rule, which is that where a special tribunal is created with limited powers and a particular jurisdiction, whenever the power given is once executed the jurisdiction is exhausted and at an end—the person thus invested with the power is in the language of the law *functus officio.*[1] This authority or jurisdiction may be vested for the purposes of a single act or determination, or for the determination of a class of cases of the same kind. In the first instance the authority is exhausted when exercised, in the second it is exhausted as to each case when decided.

Special executive tribunals are exemplified by treaty claims commissions to pass upon titles under grants of the former sovereignty when territory has been acquired by cession; or to distribute funds paid under treaties upon claims for indemnity or under awards made in international arbitration. Of such nature are courts martial, military commissions under martial law, or military rule, in territory in military occupation, various military and naval boards, consular courts, certain official functions in the customs and revenue service, the administration of the public lands, pensions, and the grant of patents for inventions. These functions range from the merest administrative and ministerial duties to the exercise of the greatest technical skill and of the most delicate discretion; from the most immediate and direct effect upon a private interest, as in granting or refusing a pension, to decisions having a wide

[1] *Ex parte* Randolph Fed. Cases, 11, 558, 1833.

influence upon classes of persons and the general public interests. Such action may be further exemplified by the issue of permits under embargo or non-intercourse laws, licenses to trade with the enemy, distributions made by the Secretary of State under treaties, determination of the character of land as swamp or overflowed, granting rights of way in the public domain, confirmation of surveys of the public lands, the action of the Secretary in cases of forfeitures, quarantine, the admission or exclusion of alien immigrants, the standard of quality of imported goods, the declaration of the due organization of a national bank, or the appointment of a receiver for one by the Comptroller of the Currency, or his determination and order fixing the amount to be demanded under the provisions of the law governing the liability of stockholders, the exclusion of matter from the mails by the Postmaster-General, the control of bridges over navigable streams by the Secretary of War, and a vast variety of other matters, together with various and occasional functions under special or temporary Acts of Congress. Many of the matters above referred to are such that the decision of them—depending as it does upon the determination of disputed or disputable matters of law and fact, and affecting, as it does in many instances, personal liberty and private property,— is hardly to be distinguished from the exercise of judicial power.

There is here to be found a place where a line of separation should be marked between the executive and judicial powers. At present it is not defined, and it is perhaps not susceptible of definition. Matters submitted to Executive decision in the first instance

may, by the legislative power, be made subject to judicial review; but it is well settled that a judicial decision cannot be made to depend for its effect upon an ultimate Executive discretion.

In a leading case upon the question—"What is due process of law?"—Mr. Justice Curtis said: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which from its nature is the subject of a suit at common law, or in equity or admiralty; nor on the other hand can it bring under the judicial power a matter which from its nature is not a subject for individual determination. At the same time there are matters involving public rights which may be presented in such form that the individual power is capable of acting upon them and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States as it may seem proper."[1]

That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the maintenance of the system of government ordained by the Constitution.[2] The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and confirming an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the

[1] Murray *v.* Hoboken Co., 18 How., 272, 1855.
[2] Field *v.* Clark, 143 U. S., 649, 1892.

latter no valid objection can be made. The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend.[1] Hence provisions in the alternative may be made accordingly as specified conditions of fact may be determined to exist.

The power of Congress to make all laws necessary and proper for carrying into execution the powers vested by the Constitution in the Government of the United States or in any Department or officer thereof, includes the adoption of means appearing to Congress the most eligible and appropriate, adapted to the end to be accomplished, and consistent with the letter and spirit of the Constitution. It includes the power to authorize the head of a Department to prescribe legislation not inconsistent with law for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records and property appertaining to it. And any such regulation is presumed to be within the authority conferred, unless plainly inconsistent with the law. As an instance in point, a regulation was sustained which reserved to the Secretary of the Treasury exclusive discretion as to the use of certain documents or certified copies thereof as evidence,[2] as against compulsory processes from a State court. As another: quarantine regulations may be author-

[1] Field *v.* Clark, 143 U. S., 649, 1892.

[2] Boske *v.* Coningore, 177 U. S., 459, 1899.

ized when those of the State or municipality are deemed to be insufficient.

The practice of authorizing the execution of laws under rules and regulations, authorized by the statutes to be prescribed, dates from the foundation of the Government. The Act of Sept. 29, 1789, directed pensions to be paid under such regulations as the President of the United States might direct. Departmental regulations have been sustained because of presumed legislative ratification. The Conscription Act of 1863 is a notable instance in which the execution of the law in detail was made to depend upon Executive regulations. The Non-Intercourse Act of 1861 is another such instance. The Army and Navy regulations resemble codes of law, and extensive systems of regulations are in effect in other departments constituting a vast body of administrative law. Rules and regulations prescribed pursuant to law for the transaction of public business become a part of that body of laws of which the courts take judicial notice.[1] They are judicially construed and when valid have the force of statute law.

The grant by Congress to the Secretary of War, in the Act of 1894, of authority to prescribe such rules and regulations for the use, administration and navigation of canals owned or operated by the United States, as in his judgment the public necessity might require, was not a delegation of legislative power. The rules made pursuant thereto had the force of law, and, the statute providing that the violation of such rules should be a misdemeanor and punishable

[1] Cahn *v.* U. S., 152 U. S., 211, 1894.

as prescribed by it, an indictment was sustained for a violation of a regulation.[1] The practice has become general to provide for similar criminal sanction of regulations, as for example, the navigation of the South Pass of the Mississippi, the regulation of the forest reservations, and various matters within the Department of the Treasury connected with the internal revenue.[2] Forfeitures may also follow the breach of a regulation. Executive orders and proclamations are in the nature of edicts, and when authorized have the force of a statute and are judicially recognized and enforced.[3]

Several provisions, such as are generally grouped in the Bills of Rights which are usually made part of the State Constitutions, are found dispersed in the Federal Constitution. The first ten amendments supplied additional safeguards in the nature of a Bill of Rights. These provisions are limitations upon the Federal Government, and have no relation to the acts or laws of the State Government. The broad provision of the Fourteenth Amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws"; is sufficient to protect the citizen from most of the aggressions which are also provided against in the State Bills of Rights.

[1] U. S. *v.* Ormsbee, 74 Fed. Rep., 207, 1896.
[2] *In re* Kullock, 165 U. S., 526, 1896.
[3] Lapeyre *v.* U. S., 17 Wall, 191, 1872.

The English Bill of Rights, and other celebrated acts, such as Magna Charta and the Habeas Corpus Act, were generally for the security of the people against executive abuses. In the American Constitution the Bills of Rights limit the legislative and judicial powers as well, they are declamatory of the common law, are construed by the common law, and are subject to the exceptions recognized by the common law.[1] A large number of such exceptions are set forth in the case cited.[2] But no official who trespasses upon the right of the citizen to life, liberty, or property, can justify himself in defense of the wrong by alleging an authority, act, or order of Government, unless the same be not prohibited by the Constitution.[3] There must be due process of law, and this phrase covers most of such trespasses. But due process of law is not confined to regular proceedings in the courts of justice. Rights to life, liberty and property may be directly affected by executive process, authorized by constitution and law.

Conscription may be authorized by law, and when so authorized, the executive power expressed through executive officers, pursuant to executive regulations, is such due process of law as may compel the able-bodied man to take up arms, subject himself to military discipline, and peril his life in the service of the State; and any attempt to obstruct such process by invoking the judicial power through *habeas corpus* may be frustrated by a suspension of the court. The

[1] Mattox *v.* U. S., 156 U. S., 237, 1895.
[2] Robertson *v.* Baldwin, 165 U. S., 275, 1897.
[3] Poindexter *v.* Greenhow, 114 U. S., 270, 1884.

Act of 1820 authorized the issue, by the Solicitor of the Treasury, upon a settlement against an officer having received public money, of a distress warrant, which has the usual incidents of an execution against the delinquent, his body, goods and lands. A title to lands sold under such process was held to be valid in the purchaser. Such executive process was held to be due process of law, sanctioned by the usage of England and the Colonies from the earliest times.[1]

The Act of 1839 deprived the party paying of a right of action against the collector of customs for money unlawfully exacted and paid under protest; remedy in such case being given by application to the Secretary of the Treasury. Individual remedy being denied, it was objected that the citizen could not be thus debarred from his resort to the courts of justice. The Act was held to be valid.[2]

Under the income tax of 1864 and 1865, the Collector was authorized to issue a warrant for the tax and penalty, and to enforce collection by levy and sale.[3] Such process was held to be valid. Proceedings for the extradition of citizens charged with having committed crimes in foreign countries are valid under treaties for that purpose. Aliens may be excluded or expelled by executive process.[4] Executive officers acting under statutory authority may fix a standard of quality of goods for importation, and exclude such as fall below the standard. Such exclusion by

[1] Murray *v.* Hoboken Co., 18 How., 272, 1855.
[2] Cary *v.* Curtis, 3 How., 236, 1844.
[3] Springer *v.* U. S., 102 U. S., 586, 1880.
[4] Fong Wu Ting *v.* U. S., 149 U. S., 698, 1893.

their action in due process of law. The courts will sustain a decision of the Postmaster-General denying the use of the mails for fraudulent purposes and making a classification of mail matter,[1] and his exclusion of lottery tickets as a fraudulent use of the mails, will prevail although a State statute has legalized the lottery. Regulations as to printed matter open to inspection may exclude it from the mails. Freedom of the press is not thus abridged, provided transportation in other ways is not interfered with,[2] but sealed mail matter may not be searched except upon sworn warrant. The authority of the Secretary of War, under the Act of Congress, after the notice and hearing, to specify and enforce changes to be made in bridges, so as to render navigation unobstructed, is valid. Military offenders subject to military law, are subject to arrest for military offenses without warrant by military officers, but civil officers may not make such arrests without due warrant; and arrest without a warrant, for breaches of executive regulations having penal consequences, is an authority too doubtful to be exercised.

As to military jurisdiction over civilians in territory where the civil courts are open, the case of Milligan v. Wallace, p. 2, decided in 1864, will long remain a landmark of constitutional law.

There is much in the foregoing to suggest a vast range of executive or administrative authority in controlling the personal affairs of the citizen. The ten-

[1] Bates *v.* Payne, 194 U. S., 106, 1904.
[2] 17 Ath. Gow. Op., 77.
[3] *In re* Rapier, 143 U. S., 110, 1892.

dency of the times is in the direction of increased application of such authority. This is shown by recent enactments, as well as current political discussion in national affairs, and has a remarkable demonstration in the foregoing chapter on Boards and Commissions. It is a question how far De Tocqueville's prediction of administrative despotism as the tendency of democracy is reaching a verification, and also whether some new definitions of the inviolable rights of persons may not be in order; whether, in short, our time-honored Bills of Rights are entirely effective as barriers against the exercise of arbitrary power.

APPENDIX

APPENDIX

THE ELECTORAL SYSTEM

In this chapter it is intended to present in a brief sketch the manner in which presidential electors have been chosen, how candidates for the presidency have been nominated, and how the electoral vote has been counted.

The Constitution provides:—"Each state shall appoint in such manner as the legislature thereof may direct a number of electors equal to the whole number of senators and representatives to which the state may be entitled in Congress. The electors shall meet in their respective states and vote by ballot for two persons, one of whom at least shall not be an inhabitant of the same state with themselves, and they shall make a list of all the persons voted for and the number of votes for each, which list they shall sign and certify and transmit sealed to the seat of the government of the United States, directed to the president of the Senate." The resolution of Congress of September 13, 1788, providing how the new Constitution should be put into operation, fixed the time for choosing the electors as the first Wednesday in January, 1789, and this left no sufficient interval within which under the then existing facilities for communication and travel the states generally might provide by necessary legislative action for a choice of electors by popular vote. Rhode Island and North Carolina had not ratified the Constitution. In Connecticut, New Jersey, Delaware, South Carolina and Georgia, the legislature appointed electors. In New Hampshire popular choice was provided for which was ratified by the legislature on joint ballot. The Massachusetts legislature chose one of two proposed by districts. In New York the two houses disagreed as to the mode of choice and no electors were appointed. Pennsyl-

vania, Maryland and Virginia provided by law for popular election. In 1792 electors in nine states were chosen by the legislatures and in five states they were chosen by popular vote. In North Carolina the members of the legislature residing in each of four districts met and chose three electors in each district, twelve in all. In 1796, ten states chose electors by legislative appointment and six by popular vote. So likewise in 1800. Pennsylvania had theretofore provided for popular election of electors by temporary laws. The Senate was then Federalist 13 to 11 and the house Republican as the popular vote would have been, but the Senate succeeded in forcing a compromise by which eight Jefferson electors and seven Adams electors were chosen by the legislature. No material change in methods of choice of electors is noted in 1804 or 1808. In 1812, New Jersey and North Carolina reverted from popular choice to appointment by the legislature. In 1824, twenty-four states took part in the election. In six the electors were chosen by the legislatures and in eighteen by popular vote, and of these in thirteen by general ticket and by districts in five. In 1828 eighteen states chose upon general ticket, four by districts, and two, Delaware and South Carolina, by the legislature. From this time the general rule has been election of electors by popular vote upon a general ticket. South Carolina continued the practice of legislative appointment until 1860. Colorado appointed in this manner in 1876, and Michigan undertook to introduce the district vote system in 1892. In 1848 for the first time all the electors were chosen on the same day. This was done pursuant to the Act of Congress of 1845.

The Constitution appears to contemplate the exercise of independent judgment and choice by the electors in casting their ballots. In 1789, 1792 and 1796 the constitutional theory seems to have been acted upon. Washington and Adams were chosen in 1789 and 1792 by common consent without any formal action prior to the voting of the electors, but in 1792, the Anti-Federalists or Republicans supported George Clinton. In 1796, Adams was a

candidate by general agreement, the opposition uniting upon Jefferson and Burr, and it so happened that upon the count of the electoral vote before Congress, Adams, then vice-president, declared his own election as President.

In 1800 the presidential contest was influenced by the choice of members of the legislature; in May it appeared that the Republicans had carried the legislature of New York, and this was regarded as decisive against Adams as the support of New York would have elected him over Jefferson. The candidacy of Adams and Charles C. Pinckney, Jefferson and Burr in 1800, was arrived at in conferences of members of Congress. At this election, as heretofore, the original rule of the Constitution was followed which provided that the electors should each vote for two persons, and that the person having the greatest number of votes according to the count before Congress, if such number should be a majority of the whole number of electors appointed, should be the President and if more than one had such majority and had an equal number of votes the House of Representatives should make the choice between them by ballot, voting by states; Jefferson and Burr having received an equal vote an earnest struggle took place in the House, resulting after many ballots in Jefferson's election, as was originally intended when the electors voted. The coincidence of equality of votes due to party support of two candidates, one for each office, and the resulting peril to the candidate for President, gave rise to the twelfth amendment to the Constitution, by which it was provided that the electors should name in their ballots the persons voted for as President and in distinct ballots the persons voted for as vice-president. At this election, the North Carolina electors acted independently, four voted for Adams and eight for Jefferson.

The first regular Congressional caucus was held February 25, 1804, when Jefferson and George Clinton were nominated. The Federalists by general consent supported C. C. Pinckney and Rufus King. In 1808, on January

21, the Virginia legislature divided in support of Madison and Monroe. The Congressional caucus on January 23 nominated Madison and Clinton. The Federalists, as before, by general consent, supported Pinckney and King. The Congressional caucus as a political agency was not regarded with favor. The call for the caucus was met with a vigorous protest and in proposing Madison and Clinton the caucus modestly declared "that in making the foregoing recommendation, the members of this meeting have acted only in their individual characters as citizens; that they have been induced to adopt this measure from the necessity of the case; from a deep conviction of the importance of union to the Republicans throughout all parts of the United States in the present crisis of both our external and internal affairs and as being the most practicable mode of consulting and respecting the interests and wishes of all upon a subject so truly interesting to the whole people of the United States."

Prior to the caucus in 1812 President Madison, it has been frequently alleged, was required to give his support to the policy of a war with England as a condition of his nomination. In New York a legislative caucus nominated De Witt Clinton. This action was followed by a Convention of Federalists representing eleven states which nominated Clinton and Ingersoll. In 1816 the opposition to the Congressional caucus was more marked than ever, but the method was followed, although but 118 out of 141 members attended. There was no opposition to Monroe, who likewise became the candidate in 1820, "The Era of Good Feeling." In this year, the caucus resolved that no nomination was expedient.

In 1824 the caucus was utterly discredited; in this year John Quincy Adams was nominated by the legislatures of most of the New England states. Clay by those of Kentucky, Missouri, Ohio, Illinois and Louisiana; Jackson by a convention of Blount County, Tennessee, and various mass meetings and conventions throughout the country. Clinton was named by several counties in Ohio; Calhoun by the legislature of South Carolina, and Craw-

ford by the legislature of Virginia and a "rump" Congressional caucus attended by but 66 members. The electoral vote having been indecisive the election devolved upon the House of Representatives and Adams was chosen. The supporters of Jackson were dissatisfied and his candidacy for 1828 became active at once. In October, 1825, he accepted the nomination of the Tennessee legislature and resigned his seat in the Senate. Many other nominations by conventions and mass meetings followed. He was regarded as the leader of a movement for freedom in politics and more direct popular participation; and by prevailing over the old order he established new methods in politics.

In September, 1830, an Anti-Mason Convention representing ten states, met, and adjourned to September, 1831, when fifteen states were represented and Wirt and Ellmaker were nominated. In December, 1831, the National Republican Convention nominated Clay and Sergeant. Jackson was unopposed as the Democratic candidate and was given many state nominations. The Democratic Convention met May 21, 1832, to nominate a vice-president. It adopted the rule requiring a two-thirds vote to nominate, which has prevailed since in Democratic conventions, and nominated Van Buren for vice-president. By resolution, the Convention concurred in the repeated nominations of President Jackson for re-election made in various parts of the Union.

In 1836, Van Buren and R. M. Johnson were nominated by the Democratic convention. The Tennessee legislature nominated Hugh L. White; a convention at Harrisburg nominated Wm. H. Harrison; the Ohio legislature nominated Justice McLean; and the Massachusetts legislature nominated Daniel Webster. By securing enough of the electoral vote for these candidates to throw the election into the House, the Whigs vainly hoped to defeat the election of Van Buren. This irregular method having failed, the usual conventions were held in 1840, as they have been since, for the nomination of Presidential candidates, and thus it has come to pass that the constitutional scheme

of election by electors has been superseded through the use of extra-legal machinery without change in the law as written, by an effectual scheme of election by popular vote prior to which the electors have been placed under a moral compulsion to vote for the party nominee. The obligation has been generally respected in the past. In 1820, a New Hampshire elector failed to vote for Monroe on the ground that no man ought ever to share with Washington the honor of a unanimous election. In 1824, a hard contest over the naming of electors occurred in the New York legislature. Of these, three who were to have supported Clay deserted him and voted one each for Adams, Crawford and Jackson. In the investigation of the cipher dispatches of 1876 there was evidence tending to show an attempt to bribe an Oregon elector whose vote if effective would have changed the result of the national election.

The formulation of the party creed naturally accompanies the nomination of the party candidate. Burke defined party as a body of men united in promoting by their joint endeavor the national interest upon some principle concerning which they all agreed. In 1800, the Republican caucus set forth the principles of Jefferson's candidacy by resolutions. In 1812, the New York legislature set forth the grounds of opposition to the election of Madison in a series of resolutions. During the Jackson movement, the adoption of resolutions at meetings and conventions became a regular practice. In 1840, the first formal national platform of the Democratic party was adopted. Excepting the Whig conventions of 1840, and 1848, it has been the practice of all the National conventions to formulate in a platform statement the orthodox political doctrine of the party represented. The perfection of party organization and methods has resulted in a tolerably certain and authentic expression of the party will in the choice of candidates, but the formulation of the party creed is not usually esteemed to be an equally authentic expression of party opinion. The platform is usually prepared by high political personages before the

convention meets, receives the formal approval of a committee and is presented to the representative assembly in a form intended to be final and under such conditions as to render impracticable any deliberate consideration or amendment of its provisions. Subtlety, evasion and ambiguity have in some instances so far characterized platforms that the candidate's letter of acceptance has been regarded as the authoritative interpretation of the party creed. The general understanding, however, is that the candidate is under an honorable obligation to support and promote the principles declared in the platform. General McClellan in his letter of acceptance made a decided repudiation of the principal declaration of the Chicago platform of 1864, and a recent dictum is that the candidate is bound not only by what the platform contains but by what it does not contain.

The Constitution provides, in continuation of the quotation already made as to the electors, that "the president of the Senate shall in the presence of the Senate and House of Representatives open all the certificates and the votes shall then be counted." The Constitution does not say by whom or in what manner; nor does it anticipate or provide a method for deciding a dispute as to the electoral count.

When the first count was made in April, 1789, the Senate elected John Langdon, a senator from New Hampshire, "president for the sole purpose of opening and counting the votes for President of the United States" and sent a message to the House notifying that body of its readiness to proceed and of its appointment of one of its members to sit at the clerk's table to make a list of the votes as declared, submitting to the wisdom of the House the appointment of one or more of their members for the like purpose. The House appointed two tellers, notified the Senate, and proceeded to the Senate chamber, whereupon, the Journal of the Senate reads: "The Speaker and the House of Representatives attended in the Senate chamber, and the president elected for the purpose of counting the votes declared that the Senate

and House of Representatives had met and that he in their presence had opened and counted the votes for President and vice-president of the United States, which were as follows: (A list is inserted), whereby it appears that George Washington, Esq., was elected President and John Adams, Esq., vice-president of the United States of America."

At the last session of Congress before the next election, the Act of 1792 was passed, regulating the election of President and vice-president and declaring the officer who shall be President in case of vacancies in the offices both of President and vice-president. The provision in regard to the latter was modified by the Act of 1886. By this act the Presidential succession in case of death, removal, resignation, or inability, of both President and vice-president, devolves in regular order upon the secretary of state, the secretary of the treasury and the secretary of war, the attorney-general, the postmaster-general, the secretary of the navy or the secretary of the interior; the officers named must be eligible to the office of President, must have been duly appointed and confirmed and must not be under impeachment when the office devolves. If upon such devolution, Congress is not in session or to meet regularly within twenty days, the person upon whom the Presidency devolved is required to convene Congress in extraordinary session upon twenty days' notice by proclamation.

The Act of 1792 provided that the appointment of electors should be made within thirty days of the first Wednesday of December in every fourth year, fixed the date of meeting of the electors, provided for the transmittal and custody of the certificates, three sets of which were to be made, one to be forwarded by messenger, one by mail and the other deposited with the district judge to be delivered upon call of a messenger from the secretary of state; a sitting of Congress on the second Wednesday in February succeeding each meeting of electors was prescribed "when the certificates or so many of them as shall

have been received shall then be opened, the votes counted and the persons who shall fill the offices of President and vice-president declared agreeably to the Constitution." In February, 1793, the two Houses by vote provided for the joint meeting and for action substantially as taken in 1789. The journal of the meeting set forth that the vice-president opened, read and delivered the certificates to the tellers. Similar proceedings took place in 1797. A detailed and careful set of rules was adopted by the House to regulate the anticipated balloting and procedure, which resulted in the election of Jefferson over Burr. The count at Jefferson's second election passed without incident, as did the counts of 1809 and 1813. In 1817 a question arose as to the count of the vote of Indiana. The state adopted a constitution in 1816 and was admitted into the Union, December 11, 1816. When all the returns except those from Indiana had been opened, objection to them was offered by a member of the House, whereupon it was stated by Speaker Clay that the two Houses in joint session could consider no business not prescribed by the Constitution. It was suggested that the Senate retire so that the House might deliberate and the question being put by the President of the Senate to the senators it was agreed to and the Senate withdrew. A debate ensued in the House over a resolution declaring the vote legal, when, by a nearly unanimous vote, the whole matter was indefinitely postponed and a message sent to the Senate that the House was prepared to resume the count. The Senate abandoned discussion of the subject on receiving the message of the House and the speaker having informed the two Houses when assembled "that the House had not seen it necessary to take any order on the subject" the count, including the vote of Indiana, was completed and the result declared.

Missouri adopted a constitution in July 1820, but was not formally admitted to the Union until August 10, 1821. Congress by joint resolution in anticipation of the electoral count provided for a declaration of the total vote,

with and without the vote of Missouri, the result of the election being the same either way.

The plan of procedure provided in 1825 upon the election of Mr. Adams was in substance the same as that adopted in 1801. The counts in 1829 and 1833 were without incident. In 1837, the case of Michigan was similar to that of Missouri in 1821 and was disposed of in like manner. The counts of 1841, 1845, 1849 and 1853 passed without incident. In 1857 objection to the vote of Wisconsin was made in the joint meeting. The president *pro tempore* of the Senate ruled that the objection was not in order, and proceeded to declare the result, when protests were made and an irregular discussion took place which was cut short by the retirement of the Senate, but was resumed and continued for two days in each House. The objection to the vote of Wisconsin was that the electors met one day after the day fixed by law, their attendance at the proper time having been prevented by a snow-storm. The vote of the state did not affect the result. Diverse views were expressed in debate and the right of each house to judge disputes in the count was asserted. The president of the Senate maintained that he had neither counted nor registered the votes, but had merely announced the state of the votes as delivered by the tellers. The subject was dropped without action. The count of 1861 passed in accordance with precedent. In January, 1865, a joint resolution was passed declaring the states in insurrection to be incapable of holding valid elections for electors for President and vice-president and declaring that no electoral votes from the states named should be received or counted. Pending action by the President upon the resolution the twenty-second joint rule was adopted. It regulated in detail the procedure upon the electoral count, made provision for action separately by each house upon objections and provided that "no vote objected to shall be counted except by the concurrent votes of the two Houses." Before the result was declared, the vice-president in answer to an inquiry stated that the

chair had possession of the returns from Louisiana and Tennessee which he held it to be his duty, in obedience to the law of the land, not to present. He also stated that the joint resolution had been signed by the President but no official notification thereof had been received. The result was declared without presentation of the doubtful votes.

In July, 1868, a joint resolution was passed over the veto of President Johnson, declaring that none of the states lately in rebellion should be entitled to electoral votes unless at the time prescribed for the election such states had adopted a constitution since the 4th of March, 1867, under which a state government had been organized and unless the state had become entitled to representation in Congress under the Reconstruction Acts. By this resolution, Virginia, Mississippi and Texas were undoubtedly excluded. Georgia had been admitted to representation but it was questioned whether the state had complied with the terms of the Act of Congress. The two Houses convened February 10, 1868. After action pursuant to the Twenty-second rule, the vote of Louisiana was recorded. General Butler having objected to the vote of Georgia, the Houses separated and the House of Representatives decided 150 to 41 against counting the vote of that state. The Senate voted 28 to 25 that the objection under the special order of the two Houses was not in order. On reconvening the president of the Senate announced that the objection to the vote had been overruled, and that the vote would be announced according to the terms of the Concurrent Resolution of February 10, 1868. This resolution adopted in anticipation of objection to the vote of Georgia had provided for a declaration of the count in the alternative. General Butler then attempted to offer a resolution which the chair refused to entertain and when he appealed from this decision the chair refused to entertain the appeal and a scene of confusion followed. The chair, nevertheless, proceeded to declare the result pursuant to the Concurrent Resolution and the Senate having

retired, General Butler renewed the discussion in the House under a question of privilege. The subject was finally tabled 130 to 55 and the matter ended.

The electoral count of 1873 proceeded under the Twenty-second joint rule. Objections were acted upon at different times to the votes of Georgia, Mississippi, Texas, Arkansas and Louisiana. The votes of Georgia were excluded because Mr. Greeley was dead when the electors voted for him, of Louisiana because of disputes arising upon conflicting sets of returns, of Arkansas for want of a proper certificate of the returns.

The details of the controversy over the electoral count of 1877 will not be entered upon; there were double returns from Oregon, South Carolina, Florida and Louisiana. The Senate voted to rescind the Twenty-second joint rule. The House was Democratic and the Senate Republican. For the election of Hayes and Wheeler the votes of the four states named were necessary. Out of this condition came the electoral commission law of 1877. It constituted a tribunal of fifteen; five Senators, five members of the House and five judges of the Supreme Court to be chosen as therein provided, to which tribunal should be submitted disputes and duplicate returns and whose decision in writing signed by the members agreeing thereto should be submitted at the meeting of the two Houses and entered upon the Journal of each House; "and the counting of the votes shall proceed in conformity therewith unless upon objection made thereto in writing by at least five Senators and five members of the House of Representatives, the two Houses shall separately concur in ordering otherwise, in which case the concurrent order shall govern." The commission eight members to seven decided in favor of the Republican returns from the disputed states and Hayes and Wheeler were therefore declared elected.

Article 1, Section 8, Clause 18 of the Constitution relating to the legislative power, provides that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing

powers and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof." This provision is the one pointed to for the authority of Congress to create the electoral Commission.

The events of 1876–77 emphasized the necessity for legislative provision for the mode of procedure upon the electoral count. After considering many plans presented and discussed at different times, Congress finally perfected and passed the Act of February 3, 1887, providing for the determination of disputed electoral votes. The Act is somewhat minute in detail and difficult to summarize. It contemplates adjudication by state tribunals under conditions prescribed whereby any controversy as to the appointment of electors may be determined, and makes detailed provision for certification by state authority of the official character of the electors. Further provisions regulate the proceedings of the joint meeting of Congress for the electoral count, which is to be held on the second Wednesday in February following the meeting of the electors, who are required to meet on the second Monday in January following their appointment. Provision is made for the orderly reception at joint meetings of objections to any certificate and for the separate action by each House upon such objections. No regularly certified and adjudicated return from any state may be rejected, "but the two Houses concurrently may reject that vote or votes when they agree that such vote or votes have not been so regularly given by the electors whose appointment has been so certified." If more than one return shall have been received that one shall be counted which has received the determination provided by the laws of the state; but in case there shall arise a question which of two or more state authorities determining what electors have been appointed is the lawful tribunal of the state, the votes of those electors shall be counted whose title as electors the two Houses acting separately shall concurrently decide is supported by the decision of such state so authorized by its laws. In case of more than

one return where there has been no state determination, the count shall be according to the concurrent decision of the two Houses. If they do not agree, the vote of the electors whose appointment shall have been certified by the executive of the state under the seal thereof shall be counted. Debate upon objections in either House is limited to two hours' time within which five minute speeches may be made. If the counting of the electoral votes and declaration of the result shall not have been completed before the fifth calendar day after the first meeting of the two Houses, no further recess shall be taken by either House until the count shall be completed and the result declared.

Democratic opinion did not acquiesce in the result of the electoral count of 1877. It was asserted in resolution of the House of Representatives and in party platforms that the title of President Hayes to his office was infected with fraud, but general opinion settled upon the conclusion that the declared result was final.

June 14, 1878, in the House, Mr. Burchard moved to suspend the rules and pass this preamble and resolution:

Whereas, at the joint meeting of the two Houses of the Forty-fourth Congress, convened pursuant to the law and the Constitution for the purpose of ascertaining and counting the votes for President and vice-president for the term commencing March 4, 1877, upon counting the votes Rutherford B. Hayes was declared to be elected President and William A. Wheeler was declared elected vice-president, for such term, therefore,

Resolved, that no subsequent Congress and neither House has jurisdiction to revise the action at such joint meeting, and any attempt by either House to annul or disregard such action or the title to office arising therefrom would be revolutionary and is disapproved of by the House; which was agreed to, yeas 215, nays 21, not voting 55.[1]

[1] McPherson's Hand Book, 1878, p. 192.

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